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Seymour I. Toll

ZONED AMERICAN

By Seymour I. Toll

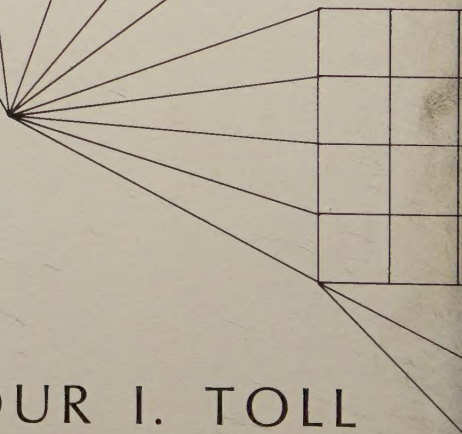
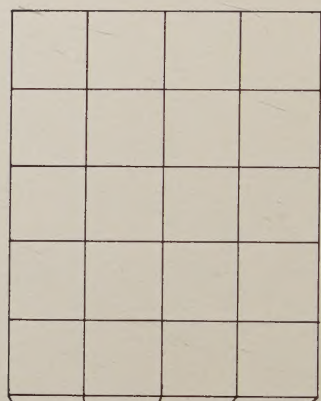
Illustrated with photographs

The historical realities of American law and its legal institutions are rarely written about for the professional let alone for the general reader. Too often myth-making and fiction surround the development of a particular law or legal concept. Historians frequently fragment accounts of law into bits and pieces.

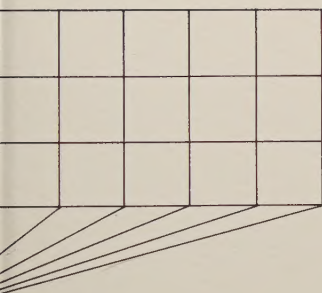
In an attempt to dispel the fiction and reveal the myths which surround too many discussions of law, Seymour I. Toll presents in ZONED AMERICAN the historical development of zoning in the United States. He encourages broad understanding of how this culture makes and uses its law. Mr. Toll has chosen one of America's most widely used and important legal institutions as his vehicle to illustrate in a clear, scholarly manner how a single legal concept becomes a political, social and legal reality, and how that reality develops as a cultural experience.

Against an essential European background, zoning—which Seymour I. Toll calls “a bobtailed term for the long-tailed power to control the height, volume, and use of the buildings, the use of land, and the density or number of people who may occupy land and buildings”—arose in the 1900s in New York. Store owners along Fifth Avenue dramatically forced zoning legislation in 1916 to keep garment workers off their street and out of their customers' sight. This extraordinary event developed from a mix of explosive urbanization, the technological growth of the steel-frame building and its indispensable elevator, the American ideal of mass production for mass demand, the driving ambitions of American business and industry, and haunting examples of Europe's great cities.

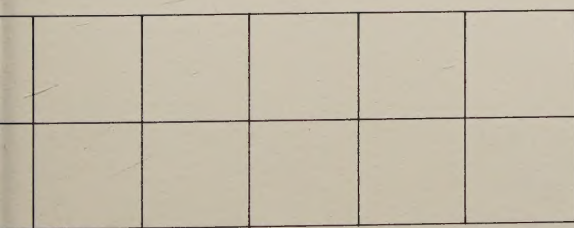
ZONED AMERICAN



SEYMOUR I. TOLL



Zoned American



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to the numerous museums, research centers,
archives and institutions that made their facilities
and illustrative documents available
to him during the writing of this volume.

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For Jean

	<i>Acknowledgments</i>
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In both the planning and development of this book I was privileged to have had the advice and steady encouragement of Myres S. McDougal, Sterling Professor of Law, Yale Law School, and Christopher Tunnard, chairman of the Department of City Planning, School of Art and Architecture, Yale University. Each was once my teacher. I regard them as my teachers still.

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the line between his friendship and his professional assistance can be drawn, because the line does not exist. Both he and his wife, Ineke, were generous to a fault in their hospitality and in the time they spent with me revealing and interpreting the varied Dutch urban scene. To have received these gifts from two people who have a special understanding of life in the United States was especially valuable. Mr. Quené's prodigious knowledge of planning affairs both in the Netherlands and here is a rich source from which I continue to draw.

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resources which they contributed to developing the graphical material used here. Notable among these are the American Museum of Photography, Philadelphia; George Eastman House, Rochester; the Museum of the City of New York; the Museum of Modern Art; and the Wilmington Society of the Fine Arts.

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I am grateful to the American Philosophical Society. The book was prepared with the support of a grant from the society's Johnson Fund.

Mrs. Joseph McSparran typed most of the manuscript. Her skill, consideration, and ability to adapt to erratic schedules helped smooth the task. Charles V. Ruane typed a portion of the manuscript under considerable pressure. I thank them both for their courtesies and their competence.

I dedicate this book to my wife, Jean Barth Toll. From its inception, she understood what the book was about. She also understood what I was about. She knows what her wholehearted encouragement has meant. Her judgment and her criticism of the manuscript have been of great value. Like her good-humored patience and warm affections, which sheltered our home against the irascibility of the author, they are a part of this book.

Throughout the work, our children—Emily, Elizabeth, Martha, and Constance—were considerate beyond my fullest expectations. I give them paternal gratitude, and join them in saying that we feel about their mother the way she feels about the study of history.

Seymour I. Toll

Cynwyd, Pennsylvania
January, 1969

	<i>Foreword</i>
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This book is about the making of an American legal institution.

I use the word “institution” to mean an established way of doing something. In this case the institution is comprehensive zoning, a bobtailed term for the long-tailed power to control the height, volume, and use of buildings, the use of land, and the density or number of people who may occupy land and buildings.

I draw law’s definition from the wisdom of Mr. Justice Holmes. Finishing the final course of the great feast which was his life, he wrote: “I can imagine a book on the law, getting rid of all talk of duties and rights—beginning with the definition of law in the lawyer’s sense as a statement of the circumstances in which the public force will be brought to bear upon a man through the Courts . . .”¹

Part 1 is a gathering of the materials out of which men made the institution. Part 2 is an account of its creation and movement into its culture. Part 3 deals with the challenges to the institution. Part 4 carries it to a new time—now.

America is a culture and therefore a sea, a sea laced with currents as powerful as those which thread the oceans of the earth. Fleeting winds and the endless spin of the earth, the ephemeral and the durable in men’s thought and conduct give them course and character.

Mighty currents are the most majestic of all the complicated forces penetrating the seas. An institution of law may enjoy a like majesty, or it may fail and be lost in its sea.

Often the shaping forces are invisible. Who has seen the pull of the moon or the push of an idea? They may run deep and distant, sometimes

moving distinctly, sometimes disappearing back into the environment from which they came. It is all one. ~

This book is about a stream in a sea.

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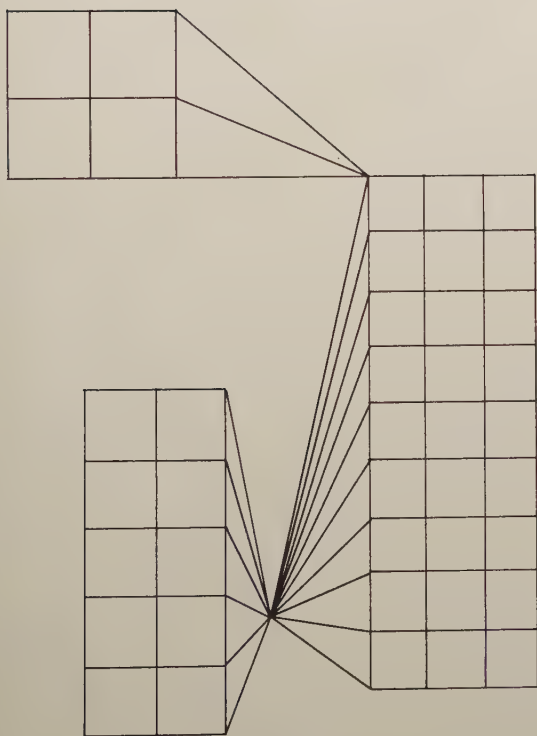
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Part

1

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If a legal institution has a life, it is delivered when an urge for public discipline begins to overtake events. The moment is often a climax. The birth of the zoning institution was in a year and in a city stirring with climactic events. New York was the city, 1913 the year.

Between 1913 and 1916 New York took the turbulence of more than a half-century of American and European experience and harnessed it with the nation's first comprehensive zoning law. More than a half-century later, most Americans were urban and most of their cities were zoned. Zoning made its appearance out of roiling thought and conduct which climaxed in 1913.

On March 4, 1913, Woodrow Wilson came to the office of twenty-eighth President of the United States. He came in a carriage drawn by four bays (Fig. 1). Clinging to the stately symbols of horse, livery, and victoria, the presidential office was caught in a holding action against the automobile. Between 1900 and Wilson's inauguration, the number of registered motor vehicles rose from virtually none to well over a million.¹ The car had already begun its remarkable transformation of the twentieth century, running down the traditional, well-drawn edges of town and country, stirring up suburbs where only land had been before, and racing the tempo of American life.

Never in the history of the presidency had the public poured forth so much good will or distributed it so roundly. They cheered the defeated outgoing President Taft as warmly as they did the victorious Wilson. Coming to Washington to hail their ex-President in his new office, Princeton men seemed to be everywhere that warm, breezy day. A thousand



1. Inauguration Day, March 4, 1913. Riding forward in the carriage: outgoing President, William Howard Taft (*left*); incoming President, Woodrow Wilson (*right*). LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.

students gathered on the west drive of the White House to sing “Old Nassau,” and Wilson left his conference with Taft to step outside and join them. For the moment at least, the righteous, sometimes austere Wilson evoked a spirit of such delight in the pleasures of the era that an expansive distiller with the same last name as the new President raised its glass in a half-page of the *New York Times*, toasted, “Long Live Wilson!” then hastily promised, “And so will you, if you drink Wilson. . . .”²

The victoria which rolled down Pennsylvania Avenue to the Capitol in 1913 carried an ardent, moralizing scholar who had given distinguished service as a teacher, university head, and governor of New Jersey. Despite the jubilation swirling through the city, when he came to the lectern his mood was intensely serious (Fig. 2).

Building upon his demands for conservation of the nation’s plundered

natural resources and protection of its exploited labor, Wilson told the country that day that he intended to conclude a persistent part of the nineteenth century. Both demands expressed his controlled outrage and revulsion at the human and material wreckage in the trampings of a rampant young industrial colossus. The lead editorial in the next day's *New York Times* called his speech "perhaps the most carefully studied, concise, and deeply moving expression that has yet been given to the new ideas which have become a force in our politics."³

Wilson won the presidency after the extraordinary 1912 campaign. Eugene Victor Debs ran for the fourth time as the Socialist nominee, heading a party which had made impressive local gains on the demand for municipal ownership of public utilities. In 1911 eighteen Socialist mayors were elected in American cities. The other major figures waged a three-cornered fight. Off to Wilson's right lumbered the Republican candidate, President William Howard Taft. Seemingly on every side of him ex-President Theodore Roosevelt led the Bull Moose attack. These three men

2. ". . . something crude and heartless and unfeeling in our haste to succeed." President Wilson delivering his First Inaugural Address. Taft is seated at the balustrade, to the right. LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.



were key figures not only for the outcome of the campaign but in the less tangible yet more important sense that they concentrated the confusion of tendencies being driven and dragged into the new century.

Wilson brought the "New Freedom," pledging to restore competition and many of the nineteenth-century opportunities which had been destroyed in the frantic growth of post-bellum business and industry. He made this promise by asking for the dissolution of trusts ("illicit competition") but not big business. The soaring ideals he preached were swept up in a great political and social movement called reform. But he was asking for a kind of reform that was as much a restoration as a forward direction, a return to old values which had once made it possible for the little American to grow into a big one. The Wilson style was elegant, highly literary, and conservative in the now rather outmoded sense of the word.

President McKinley had called Taft from the federal bench in Ohio, taking him away from judging, the one role he loved above all others. Taft served as the first civil governor of the Philippines, and as Secretary of War and intimate advisor and helpmate to Teddy Roosevelt, who groomed him to succeed to the presidency in 1908.

Taft was "good times" incarnate, a national delight (Fig. 3). With great reverence for the past, good-humored, possessed of a legendary laugh with a smile to match, he was the soul of simple good will. His frequent jokes at his own expense seemed like repeated proofs of these jolly virtues. He had the most discussed physique in the history of the presidency. Mark Sullivan called it "354 pounds of jovial flesh."⁴ It invited endless, innocent humor in anecdote and cartoon, but by 1912 it had been turned into evidence that he was a lazy President.

He was unhappy in the office, unwilling to push and probe its limits of power as T. R. had done so brilliantly before him. By the end of Taft's first term, Roosevelt progressives were pillorying him as a reactionary who had subverted Teddy's fighting principles. In 1908 Roosevelt handed the incoming Taft many of those principles in the form of unfulfilled promises which he saddled on the new administration. There is some reason to believe that in fact the vaguely Falstaffian nineteenth-century conservative did as much as Roosevelt to advance important progressive measures. This was particularly apparent in Taft's support of the Sixteenth (income tax) Amendment to the Constitution. Roosevelt, who wore



3. William Howard Taft. A 1908 rendering.

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AND PHOTOGRAPHS.

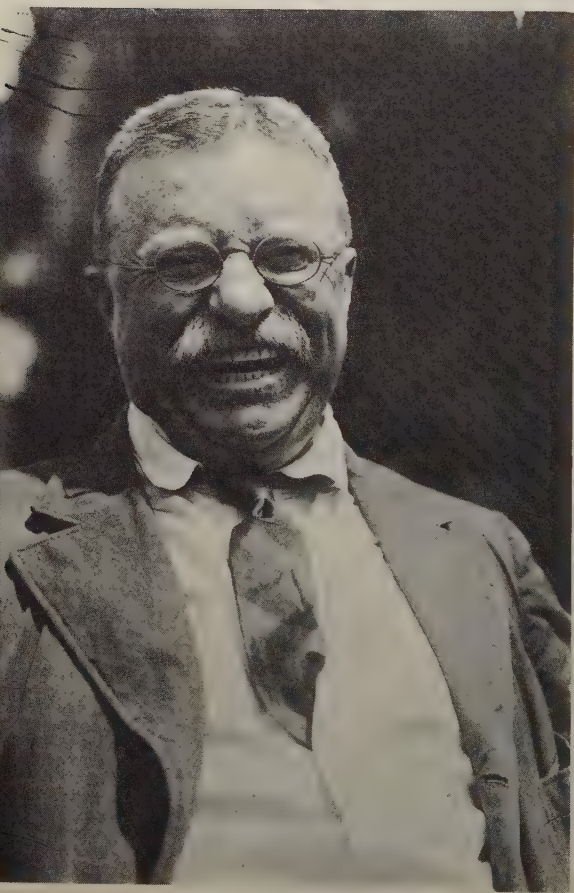
“trust buster” as one of his many pugnacious titles, had presided over an administration which started less than half as many antitrust suits as the Taft administration did. Taft’s move against United States Steel in 1911 was one of the acts which led Roosevelt to break with him.

The President who unleashed the progressive myth succeeded to the office upon McKinley’s assassination in 1901. Mark Hanna, king-maker to McKinley, was horrified. “I told William McKinley it was a mistake to nominate that wild man at Philadelphia. I asked him if he realized what would happen if he should die. Now look, that damned cowboy is President of the United States!”⁵

On the stump, out in the Dakota Badlands, or mixing it up with his children in the White House, Roosevelt rode the bronco of early twentieth-century America as if he never doubted he would bust it. Whether in derision or adulation, for years his countrymen thought of him as exploding energies. And when they saw his face during the early 1900’s, they

usually saw it with a grin that was as much a frame for teeth as an acclamation of the joyous, vigorous life (Figs. 4, 5).

He had a big bite, enormous gusto, and singular skill at making thrashing movement seem like driving purpose. He was, in fact, a brilliant compromiser, who left a greater mark on the office than anyone since Lincoln. Again and again through dramatic maneuverings, such as those in the coal strike of 1902, he demonstrated how far an imaginative President could stretch the power of the office, how much he might use it to



4. Theodore Roosevelt. The 1916 Conkwright and Winn portrait. LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.

5. Teddy and the vigorous life. An untitled cartoon by William C. Morris from *The Spokesman Review* (Spokane), May 27, 1909. LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.

publicize the great issues of his time. He seemed to make the presence of government not only interesting but palatable.

At the close of his presidency, he was bound out for Africa to stalk big game and gather natural specimens for the Smithsonian Institution. On the return trip he rode in triumph down the boulevards of Europe and then, in June 1910, came home to a tumultuous New York welcome. In the parade was an escort of his old regiment, the "Rough Riders," wearing their Spanish-American War uniforms.

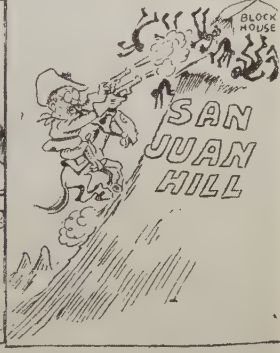
News Item: "Roosevelt Is Having the Time of His Life." He Always Has It.



He had it when he was ranching in the wild and woolly.



And when he was police commissioner of New York.



And when he served in the Spanish-American war.



And when he was governor of New York.



And when he was president of the United States.



And he has it in Africa.

Disillusioned over what he believed to be Taft's conservative conduct of the office, Roosevelt developed a seemingly new message. It marked him as the most radical of the three major candidates in 1912. In August 1910 he delivered a dedication speech at the John Brown battlefield in Osawatomie, Kansas, calling anew for a "Square Deal." He wanted the rules changed. He wanted to create a "New Nationalism" to handle the major problems of the nation. A canon of the creed was that "every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it. . . ." ⁶

It was a demand for an unprecedented breadth and increase of government power and a threatened invasion of the nearly absolute privacy of private property. While there is substantial reason to believe that Roosevelt did not intend the radical meaning which later historians found in the passage,⁷ his attitude unnerved Taft and many other conservatives. But his emphasis on the power of government and the limits of the privacy of property was in the early twentieth-century air.

Unable to capture the Republican nomination, Roosevelt ran for the Progressive party, keynoting his convention speech with the apocalyptic cry: "We stand at Armageddon, and we battle for the Lord."⁸ He campaigned with impassioned energy vividly demonstrated in a Milwaukee episode. When he was on the way from his hotel to a speaking engagement a would-be assassin shot him. Roosevelt insisted on speaking before an entourage and an audience torn between horror and unbridled admiration. "I have a message to deliver and will deliver it as long as there is life in my body."⁹ It was an unimportant speech, but he delivered it. Only then would he allow himself to be taken to a hospital to have the bullet removed from his chest.

Immense and often wild strengths; good feeling; an emergent new role for government; private property no longer quite sacred; reforming conservatives and conservative reformers; a yearning for the old century and an excitement over the new; and all of the power and sentiment running together and apart as the complicated churnings for reform in the early 1900's—such were some of the strong currents which crossed in the election of 1912. They had been gaining strength for some years before. Thrust into the midst of this turbulence was a way of looking at things which, although not new for America, was sufficiently revived, refined, and refreshed by men like William James and John Dewey that it may be regarded as a

major mark of the century's turn—the “attitude of looking away from first things, principles, ‘categories,’ supposed necessities; and of looking towards last things, fruits, consequences, facts.”¹⁰ Pragmatism brought a weaning away from the settled dogmas of law and social conduct of the previous century.

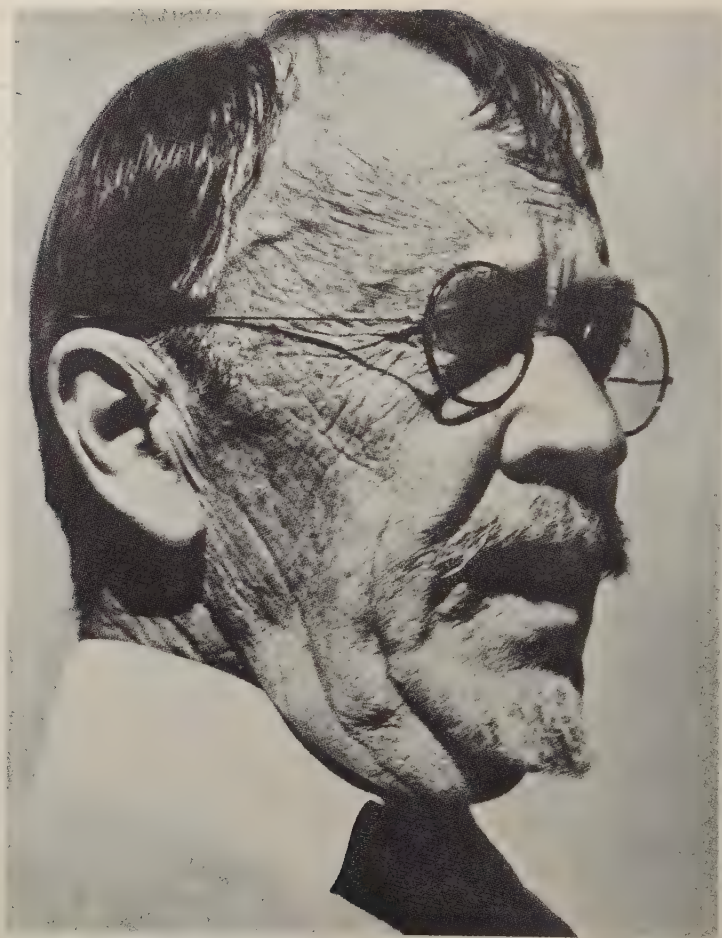
By the time of the election Washington had become the focus for the possibilities of public control over what had traditionally been private matters. But it was out of the cities of the late nineteenth century that the great movement, now called Progressivism, had come. It welled up through states like Wisconsin and Oregon. They had innovated the direct primary, the initiative and referendum, and appeared to be bringing political control closer to the populace. They took on new powers to regulate railroads and public utilities. It had been a series of repeating lessons which were lost on neither Roosevelt nor Wilson.

Whatever reform may have meant, and whether Roosevelt or Wilson could lay first claim upon it, the nation had smelled the need for important changes in the stench of sensational disclosures coming out of its political and economic life. The muckrakers got their name and some of their style from Roosevelt's advice: “Don't flinch, don't foul, and hit the line hard.” They had been pulling at the corruption during the better part of his administration. Although they had passed from the scene by the time Wilson was inaugurated, his election was a clear culmination of their work.

One of the first great exposés began in 1902. It was never surpassed in its anger or shocking impact. It came out of the American city.

During 1902–1903 Lincoln Steffens (Fig. 6) raked through cities like St. Louis (“bribery prices for all possible sorts of grants”); Pittsburgh (“politically it is hell with the lid on”); Philadelphia (“corrupt and contented”); and Minneapolis (“the government of a city asked criminals to rob the people”). In his series of circulation-building articles for *McClure's Magazine*, he wrote “to move and to convince.”¹¹

Subsequently published as a book in 1904, *The Shame of the Cities* was an opening barrage in an attack joined by works such as Ida Tarbell's *History of the Standard Oil Company* (begun in *McClure's* in 1903); Ray Stannard Baker's *The Railroads on Trial* (1905–1906), and David Graham Phillips's *The Treason of the Senate* (1906). In 1906 Upton Sinclair's *The Jungle* spewed its account of the nauseating conditions in the packing houses of Chicago. The range of attack was immense. The rot seemed to



6. Lincoln Steffens. LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.

be everywhere: in legislatures, in high finance; in the sturdy old reliable Yankee types as well as the pliable new immigrants. The Steffens accusation was sweeping: "The spirit of graft and of lawlessness is the American spirit."¹²

Many of the abuses shared a common nurture. They fed on the outgrowth of a theory which was indicted, tried, and convicted of heresy in Tennessee in the 1925 Scopes trial: evolution. However theologically unsatisfying Bible Belt exegetes found Darwin's thought during the 1920's,

it had earlier supplied the philosophical basis for social Darwinism, a doctrine which was launched in the latter nineteenth century and was passing through the twentieth when Wilson delivered his first inaugural address. He touched upon it. "There has been something crude and heartless and unfeeling in our haste to succeed and be great. Our thought has been 'Let every man look out for himself, let every generation look out for itself,' while we reared giant machinery which made it impossible that any but those who stood at the levers of control should have a chance to look out for themselves." ¹³

Darwin gave a sober, revolutionary account of the "great battle for life." It was nothing less than an ordering of all living things. His tenets of gradual organic change through mutation in the environment's selection of the fittest appeared in *The Origin of Species* in 1859. It was one of the most influential ideas in the history of thought. In 1871 he applied the thesis to the origin of the human race, published as *The Descent of Man*. Like a massive earthquake, evolution rocked the foundations of many Western structures—religion, philosophy, ethics, and the newly developing social sciences.

The English philosopher Herbert Spencer was a friend of the great evolutionist. Coiner of the phrase "survival of the fittest," Spencer linked the vast development of nineteenth-century natural science to the social sciences. In 1870 Darwin wrote of Spencer: ". . . I suspect that hereafter he will be looked at as by far the greatest living philosopher in England; perhaps equal to any that ever lived." In a letter to Spencer two years later Darwin told him that "Everyone with eyes to see and ears to hear . . . ought to bow the knee to you, and I for one do." ¹⁴

In evolution Spencer found the building blocks of social Darwinism. Evolution is an iron law of the universe. *Laissez faire* is its indispensable condition. Human progress, measured in eons, is its product.

Nine years before Darwin published *The Origin of Species* Spencer had begun to lay the blocks. His *Social Statics* (1850) flavored these cosmic abstractions with some practical examples of how they worked themselves out. "It seems hard that a labourer incapacitated by sickness from competing with his stronger fellows, should have to bear the resulting privations. It seems hard that widows and orphans should be left to struggle for life or death. Nevertheless, when regarded not separately, but in connection with the interests of universal humanity, these harsh fatalities are seen to

be full of the highest beneficence—the same beneficence which brings to early graves the children of diseased parents, and singles out the low-spirited, the intemperate, and the debilitated as the victims of an epidemic.”¹⁵

Social Darwinism is a fine example of one of the major occupational hazards of intellectual history, the capacity of ideas to appear to have much wider acceptance than respectable evidence warrants. It is the kind of error which rises in roughly direct proportion to the degree of student interest which an idea generates. How broad was Spencer's influence in America?

The most exhaustive attempt to answer the question appears in *Social Darwinism in American Thought*, by Richard Hofstadter. First published in 1944, it was in the van of historical studies which concluded that the influence was pervasive in approximately the last third of the nineteenth century and into the new one as well. The proof of this view appeared most frequently in examples of the post-bellum business tycoons. As the argument went, Spencer offered them a perfect rationalization for the brutal competition out of which they gathered their riches and power. They survived and prospered because they were the fittest in the struggle. Success was the practical demonstration of Spencer's theory.

Fairly recent revisionists challenge this conclusion, contending that at least in the case of the barons of the era there is only fragmentary evidence to support it and to some extent even that is misused. These historians suggest that almost none of the new wealthy used Spencerian terms expressly to justify their conduct. Those few who did were bookish exceptions.¹⁶

However thin their ranks, Andrew Carnegie was one of them. The steel tycoon was most explicit. “Few men have wished to know another man more strongly than I to know Herbert Spencer, for seldom has one been more deeply indebted than I to him and to Darwin.”¹⁷ By Spencer's own account, Carnegie was one of his two closest American friends.

In 1902 John D. Rockefeller, Jr., explained successes like his father's in a talk to the YMCA at Brown University. “The growth of a large business is merely a survival of the fittest . . . The American Beauty rose can be produced in the splendor and fragrance which bring cheer to its beholder only by sacrificing the early buds which grow up around it. This is not an evil tendency in business. It is merely the working out of a law of nature and a law of God.”¹⁸

Spencer came to the United States in 1882 in what prominent historians variously describe as "practically an occasion of state" and an "unprecedented triumph."¹⁹ It was a strange visit under an incognito which failed to keep reporters from showing up at the New York pier where he landed. During his stay Spencer delivered one speech at a glittering farewell banquet at Delmonico's in New York. They may have neither read nor understood him, but for some reason many prominent businessmen appeared at the festivities. In a speech as memorable for the apprehension it caused the nervous philosopher as for what he said, Spencer summed up his visit by advising his American listeners that "we have had somewhat too much of the 'gospel of work.' It is time to preach the gospel of relaxation."²⁰

There were tycoons, but there were also other followers from callings in American life in which Spencer's influence was not arguable. The evidence is that it was overwhelming.

William James was harsh. Spencer had a "dry school-master temperament, the hurdy-gurdy monotony of him, his preference for cheap make-shifts in argument, his lack of education even in mechanical principles, and in general the vagueness of all his fundamental ideas, his whole system wooden, as if knocked together out of cracked hemlock boards . . ." Yet he catalogued Spencer with Plato, Locke, and Hegel, and suggested that "the half of England wants to bury him in Westminster Abbey."²¹

The Englishman's thinking penetrated the social sciences of the era, and one American social scientist was the most influential social Darwinist in the United States. For about a quarter of a century William Graham Sumner, Professor of Political and Social Science in Yale College, waged what Richard Hofstadter has called a "holy war against reformism, protectionism, socialism, and government interventionism."²² He did it with admirable consistency, as willing to apply the dumb force of competition to his own chair as to the descent of man.

In Sumner's view the major task of government was to protect property and feminine honor from crime. Among his aversions were charitable institutions, state laws regulating prison labor, poor laws, and legislative control over the conditions of labor. Pre-eminently teachers of a philosophy, Spencer and Sumner had been instructing men who came to their mature years as the century was turning. Some of them lived to impress their influence upon great events as late as the 1930's. One of Sumner's Yale

students rode beside Wilson in the carriage which took him to his first inauguration.

In 1906, nearly thirty years after his graduation from Yale, Secretary of War Taft lectured at his alma mater and recalled the stuff of which his political views were made. "The tendency in my own case, and I think in that of most graduates of my time, was toward the *laissez-faire* doctrine that the least interference by legislation with the operation of natural laws was, in the end, the best for the public; that the only proper object of legislation was to free the pathway of commerce and opportunity from the effect of everything but competition and enlightened selfishness; and that being done, the Government had discharged all of its proper functions." ²³

Spencer was a vogue of several decades. It crested at about the time that Oliver Wendell Holmes, in very Jamesian terms, wrote to Lady Pollock in 1895 to deliver one of his swift judgments on the style and measure of a man's work: "He is dull. He writes an ugly uncharming style, his ideals are those of a lower middle class British Philistine. And yet after all abatements I doubt if any writer of English except Darwin has done so much to affect our whole way of thinking about the universe." ²⁴

A decade later Holmes was sitting on the Supreme Court of the United States, a Roosevelt appointee. Now turning his instinct for the jugular into a famous dissent, he protested the depths to which Spencer had affected the judgments of five of the most powerful men in the United States—the Supreme Court majority which decided *Lochner v. New York* ²⁵ in 1905.

Lochner brought up to the Court what every case carries there, a vessel filled from the American well. A New York bakery operator attacked state legislation restricting his laborers to ten hours a day or sixty hours a week. He argued that the law had taken his property without due process and therefore violated the Fourteenth Amendment of the federal Constitution. His property, he claimed, was his unfettered right to buy as many hours of bakery labor as he chose.

New York passed the law believing it had the power—the police power—to do so. According to American legal theory which began to develop in the early nineteenth century upon the foundation of two previous centuries of English law, the State's police, in the broadest sense, was a system of internal regulation. The system preserved the public order, and, in addition, established among its citizens a body of rules whose central purpose was

the enforcement of an ancient legal maxim: Use your own property in such a manner as not to injure that of another. This concept came to embrace not only property but also the protection of the life, health, comfort, and peace of the community. Eventually the concept settled into the vague and sweeping legal orthodoxy of "the health, safety, morals, and welfare of the community." American state and local governments claimed their authority to enact laws to protect these broad objectives in the police power.

The *Lochner* statute came in the midst of the great reform movement in which Roosevelt, the muckrakers, and latterly Wilson played so large a role. Many of the demands for progressive state and local legislation rested their claims to legitimacy on the police power. Thus, *Lochner's* outcome could have important consequences in making or breaking emergent social legislation.

Zoning as an institution was raised in the *Lochner* era. It appeared in the midst of the legal conflict over the limits of the police power, in reality law's lesser version of a great political fight in 1912 over the extent to which government could intervene in social issues. This question of power was to be as decisive for the constitutional fate of zoning as it was for the New York bakery legislation.

Splitting five to four, the majority in *Lochner* struck down the New York law as an unreasonable and unconstitutional exercise of the police power. They held that there was no basis for interfering with the liberty of a baker or his employer to contract for hours of labor. After observing that the control of working hours had no possible connection with anything but the worker's health, the majority concluded that while a bakery might not have been the healthiest place to spend ten or more hours a day, it was vastly more so than some other places a man might earn his daily bread.

What Holmes wrote in his *Lochner* dissent became a several-dimensional classic. It was one of his many and unique epigrammatic flashes of faith that government, like life, is an experiment best conducted in freedom. It was a bridled announcement of his anger over the intrusion of a judicial ideology into attempts at social innovation. And it was primary proof, if any further proof were needed, that early in this century an important part of that era's American law was being beaten out with a philosophy which was an excellent rationalization for the root, hog, or die conduct in which

even the most intellectually oblivious entrepreneur participated.

"The Fourteenth Amendment," Holmes said, "does not enact Mr. Herbert Spencer's Social Statics." ²⁶ Of Justice Peckham, author of the majority opinion, Holmes later wrote: "I used to say his major premise was God damn it. Meaning thereby that emotional predilections somewhat governed him on social themes." ²⁷ For now, nothing more need be said about the specific cases of such predilections.

Although Darwinism put a decisive turn upon the direction of much American thinking in the period, one of the grand inconsistencies of the time was that in the midst of rampaging social Darwinism evolution began a complete reversal of its Spencerian thrust. While the social Darwinists were using it to justify the absence of public restraints on conduct, evolution offered a theory for imposing restraints in the concept of controlling the environment through public planning.

According to the developing theory, if man's environment is decisive in his evolution, then the intelligent shaping of the environment ought to insure that evolution will bring improvement. Thus, as Oscar Handlin has suggested, out of this logic came a new body of social thought which held that controls fashioned for such goals as slum eradication, free land in the West, and the restraint of wealth would lead to the elimination of crime, the growth of democracy, and the disappearance of corruption.

He summarizes the argument: "An understanding of the basic forces that moulded American civilization did not [despite the exposures of muckracking] diminish faith in progress. By isolating the causes that impeded development the scholar could aid in their removal; his explanation of the ill effects of unrestrained wealth would help the citizens control it through their government. Modern man did not have to allow the blind chances of nature to determine the course of evolution; the use of his intelligence could shape its direction." ²⁸

This was, in a nutshell, the root assumption of the American urban planning movement as it took form at the turn of the century. For decades thereafter, zoning was thought to be the prime instrument of that movement. It was as inseparable from planning's modern origins as Darwinism was from both of them.

The evolution of evolution in the United States is as cross-grained as anything cut from the trunk of a great idea. Out of the same seed grew demands for *laissez faire* and public control. Although they ran absolutely

counter to each other, they had arisen from the common major premise that evolution is scientifically true. And, with a kind of sporting indifference to Aristotle's prohibition against warring minor premises, they ultimately converged in the identical conclusion that evolution inevitably yields progress.

Since history is not an endless series of discrete vessels, there are no distinct ages. But the river rises and falls. Its bottom shifts. Banks build and crumble, and the young currents feeding it in early spring run differently down a course which carries the flow of summer's end.

The early twentieth-century American was unique. He may have been heedless of the vaulting structure of abstract ideas. He may have been deeply influenced by the tangible promises he sensed in such material things as the automobile and the airplane. But whatever his ignorances, whatever his intimations, the American in every region and station of life had an overriding faith that he was living in the best of all possible worlds. That world was an improving world. His optimism may have worn overalls or a Prince Albert, but the body of the faith was the same. Things did indeed seem to be getting better all the time. Beyond anything else in its political significance, the election of 1912 saw the triumph of an intensely hopeful philosophy called Progressivism.

The depths of optimism may be sounded by the worries of a man or a nation. Despite Wilson's great concern over the consequences of social Darwinism, the silences of his first inaugural strike harder than his eloquence. There was nothing about race relations, no reference to the awesome rise of urbanism then already well under way, and, save for the sparest mention of the tariff, foreign affairs were completely absent.

To appreciate the enormity of the changes about to occur, consider his second inaugural address four years later. The official ceremony lasted but a moment before a handful of intimates. The next day he went through the motions of a public inauguration now as grim as the pomp and circumstance had been joyous four years earlier. The *Times* reported: "It was not a festive occasion, it was not a holiday, it was not a merrymaking, and to pretend that it was any of these things would have made the occasion grotesque . . ." ²⁹

If the first inaugural had nothing to say about foreign affairs, the second had practically nothing to say about anything else. In one brief opening paragraph Wilson swept aside the decades of struggle for domestic reform

which had carried him into office. He spoke only of a United States looking gravely upon what was still a European war. A single sentence ended the years before: "We are provincials no longer."³⁰

There were no such worries in 1913. If Wilson was the new captain of the ship of state, his toughest problem was controlling the engines of unprecedented capacity on a vessel without direction from home, without threats from abroad. The nation's remarkable reach matched its President's grasp of these new and extraordinary energies. Before it smashed against the Great War, a vast wave of optimism rolled across the early twentieth century. Walter Lord called the time " 'The Good Years', . . . good because, whatever the trouble, people were sure they could fix it."³¹

From every corner came witnesses to the remarkable mood.

The men who brought zoning into being worked in a period which Samuel Eliot Morison subjectively called "a golden age of the Republic," the years leading to 1914. Certainly in no subsequent era of American history (and probably none before) has the adjective been used with such frequency and conviction. He saw its glories spun from youth, the economic power of the great middle class, and "a feeling that justice and prosperity for all was attainable through good will and progressive legislation." There was "a euphoria in the air."³²

In 1914 Herbert Croly took over direction of a brilliant group of editors on *The New Republic*, the finest of the progressive weeklies. Eight years earlier he had published a book which was to give the name and content to Roosevelt's "New Nationalism" announced in his Osawatimie speech. Croly entitled it *The Promise of American Life*, like a banner of hope which his text confirmed. "The fault in the vision of our national future possessed by the ordinary American does not consist in the expectation of some continuity of achievement. It consists rather in the expectation that the familiar benefits will continue to accumulate automatically." He named the attitude "optimistic fatalism."³³

As he suggested, such a shining view of American life, now and forever more, was not the myopia of an elite. It overflowed in popular culture. Between 1910 and 1912, for example, three of the nation's greatest song hits fairly groaned with good feeling: "When Irish Eyes Are Smiling" (even though not many years before the want ads advised that Irish need not apply); "The End of a Perfect Day," evoking "moods of peace and repose for literally millions of average Americans";³⁴ and "Ah! Sweet

Mystery of Life." Along with the sweetness came speed, a hastening of the beat in work and play. Popular dancing was a national craze.³⁵

Despite the blooming growth of the cities, the nation felt an intimate affection for the rural ways it was rapidly shedding. In 1910 well over one-third of all city residents were of rural origin.³⁶ In the sales records of sheet music were statements of the pervasive nostalgia for country life: "In the Shade of the Old Apple Tree" (two and a half million copies sold in 1905); "Down by the Old Mill Stream" (four million copies in 1910); "Let Me Call You Sweetheart" (eight million copies in 1910).³⁷

The theater dominated popular entertainment, and the passage of time only emphasizes the age's taste for whipped cream. Victor Herbert's great hit of 1910 was *Naughty Marietta*. Three years later it was *Sweethearts*—hardly a *West Side Story*.

By 1913 Hollywood was established as the cinema capital of a nation which, shortly after Wilson's first inauguration, would exchange much of its free-swinging optimism for a deep disenchantment, the rack of a great depression, warfare on an unprecedented scale, and the Bomb. Caroming out of the same medium which unleashed the Keystone Cops, *The Tramp* (1915) gave Chaplin an early opportunity to ask a silent question about the pathos in the comedy.

Of course, optimism was not a new American attitude. It came on the boats to Jamestown and Plymouth Rock and stayed to cross the continent.³⁸ But the intensity of the feeling was novel, as was the peculiar mixture into which it was cast. That such a deep sense of promise and well-being was upon a people so widely acquainted with the seaminess of national life appears to be either vast national delusion or a testament to the flexibility of the American imagination. The genius of the age, a genius which zoning would share, was its capacity to keep the jolliest outlook while it plowed through an urban, industrial sea turbulent with outrageous conduct.

Full-flowered examples of social Darwinism did little to sober the intoxicating belief in the certain improbability of national life. On the contrary, the examples of what reform could accomplish in men and institutions were like boot straps which society used to pull itself to new levels of promise. However widespread the abuses, corrective efforts continually appeared to prove that things could indeed get better.

Headed for distinction as a leader in the New York movement for early twentieth-century reform, Jacob Riis sailed in steerage from Denmark to

seek his fortune. As a police reporter on the *New York Tribune* and the *Evening Sun* he became Commissioner Theodore Roosevelt's close friend and turned a journalist's knowledge of tenement degradation into a great influence for raising the conditions of life.

The housing iniquities on the lower East Side ran to the schools as well. Riis described one as "so overrun with rats that it was difficult to hear oneself think for their squeaking in the dark 'playground,' when the children were upstairs in their classes."³⁹ Through lectures and documentary photographs (Fig. 7) of scenes the squalid equal of any Hogarth had drawn of pre-industrial London, he helped initiate housing legislation in 1901. In the same tradition, in 1903 DeForest and Veiller published their monumental account of the fight for ameliorative law, *The Tenement House Problem*.

Like his work, Riis's life was proof of the reality of progress. Within less than thirty years a penniless Danish carpenter had made himself into a respected and influential figure in his adopted country. In 1913 New York honored him with the chairmanship of its New Year's Eve rites.

He celebrated this experience of personal and public progress in his autobiography, *The Making of an American* (1901). Looking back across his life, he wrote:

Light ahead! The very battle that is now waged for righteousness on the once forgotten East Side is our answer to the cry of the young who, having seen the light, were willing no longer to live in darkness . . . "What does it all help?" the doubting Thomases have asked a half-score years, watching the settlements build their bridge of hearts between mansion and tenement, and hundreds give devoted lives of toil and sacrifice to make it strong and lasting; and ever the answer came back, sturdily: "Wait and see! It will come." And now it has come. The work is bearing fruit . . . So the country is safe. When we fight no longer for the poor, but with the poor, the slum is taken in the rear and beaten already . . . I am still a young man, not far past fifty, and I have much I would do yet. But what if it were ordered otherwise? I have been very happy. No man ever had so good a time. Should I not be content?⁴⁰

This was not an isolated sentiment. Ray Stannard Baker, a leading muckraker, spoke for his guild. They had made their exposés "not because we hated our world but because we loved it. We were not hopeless, we were not cynical, we were not bitter."⁴¹

As Riis had turned the camera on the domestic horror, so Lewis W. Hine recorded the Bosch nightmare of industrial life at the turn of the cen-



7. Tenement child, c. 1888. PHOTO. BY JACOB A. RIIS. JACOB A. RIIS COLLECTION, MUSEUM OF THE CITY OF NEW YORK.

tury (Figs. 8, 9). It was a calculation of the price social Darwinism was exacting from the bodies and lives of American children. In 1900 nearly two million children aged ten to fifteen were "gainfully employed."⁴² They were giving twelve-hour days in the cotton mills and urban sweat shops for daily wages of forty cents. Yet protest brought improvement. As a result of crusading organizations such as the National Child Labor Committee and men like Hine, states in both the North and South were moved to pass



8. This child, called a carrying-in boy, was an assistant to night-shift workers in an Alexandria, Virginia, glass factory. PHOTO. BY LEWIS W. HINE. GEORGE EASTMAN HOUSE COLLECTION.

wide ranging legislation controlling the conditions of labor. It was on such matters and in such a spirit that Wilson had spoken to the nation in 1913 even though he declined to press federal government regulation of the problem.

The point of it all was not simply to expose social injustice, but to act upon the disclosures and to act with the deepest faith that life would improve. Nothing was intractable.

Competitive, progressive, and with the trace of hauteur which proves that a democracy can breed natural aristocrats, the American girl is a creature of the era which also produced the suffragette and the socially conscious woman. Charles Dana Gibson helped form her in a *Life* of a vintage quite different from its namesake's. His prolific illustrations of the Gibson

girl were invitations to break the nineteenth-century mold of sheltered gentility. Her vigorous, tailored look was largely the effect of a high-collared shirtwaist which set a standard of styling and became an enduring favorite of the period.

The resemblance between that girl and the one who made her garments was less apparent than the one between a detergent goddess and the contemporary American housewife. The shirtwaist seamstress was an immigrant who, when she was not leaning long hours into a sewing machine, very likely spent most of her life's small remainder in a ratty lower East Side tenement.

After earlier abortive efforts to organize the woman's garment field, in 1909 workers struck New York City's Triangle Shirt Waist Company. The picketing women were beaten and arrested. The strike spread until two thousand clothing workers rallied for a mass meeting at Cooper Union.

9. A ten-year-old spinner in a North Carolina cotton mill, 1909. PHOTO. BY LEWIS W. HINE. GEORGE EASTMAN HOUSE COLLECTION.



There a young woman addressed the crowd in Yiddish, describing how she had been brutalized by shop guards. Then she called for a general strike of all shirtwaist makers. The crowd went wild, rose, and with outstretched arms vowed its support with the oath: "May this hand wither from the arm I now raise."

The strike grew to some twenty thousand women. It got help from the Socialist party and other unions as well as from such socially prominent women as Mrs. O. H. P. Belmont and Anne Morgan who used their influence to stop the beatings. The "Uprising of the 20,000" was settled only to be followed in 1910 by "The Great Revolt," in which fifty-five thousand women's cloak and suit workers struck the industry with the backing of the International Ladies Garment Workers Union. These protests against working conditions in which fourteen hours a day at twenty cents an hour were not unusual resulted in a Protocol in the women's clothing industry which led to a new level of unionism in the United States.⁴³

Then, having survived the ordeal of the bitter strife to organize, 146 shirtwaist makers, most of them young girls, burned or leaped to death on March 25, 1911 when their workshop went up in flames. They had finished their day's work, Saturday's work, at the Triangle Shirt Waist Company. One of the nation's largest operators, Triangle occupied the ten-story Asch Building, a stone's throw from elegant Washington Square at the foot of Fifth Avenue. The shirtwaist material was highly fetching and inflammable. The building had no sprinklers, one fire escape ending in mid-air, and a height beyond the reach of existing fire equipment.⁴⁴

Three months after the tragedy, New York State began a sustained four-year legislative drive for reform. It yielded a series of landmark acts controlling industrial building standards as well as the conditions of labor. Some of the demand for zoning was fueled with the fear of recurrent Triangle fires.

Most of these evils of the opening years of the century smoldered visibly in the cities. If there was to be reform, the phoenix would have to rise there. That was the message of Frederic C. Howe's book, *The City: The Hope of Democracy*. By the time he first published it in 1905 he had fought his way through the corruption and redemption of Cleveland politics under Tom L. Johnson, possibly the greatest of the nation's reform mayors. The city was governed by big business and privilege, Howe wrote, and as he saw it economics shaped conduct and thought. If he had a formula, it was munic-

ipal ownership of utilities and a Henry George theory of urban taxation. Concentrate all taxes on land, he urged, and thus bring idle land onto the market where it can be turned to socially productive uses. This was just too simple to be labeled Marxist, for even though many of Howe's terms smacked of this nineteenth-century doctrine, his ultimate views would probably have seemed to Marx like no more than a variation on the great middle-class theme of American life, unprogrammed hope. "To the city, we are to look for a rebirth of democracy, a democracy that will possess the instincts of the past along with a belief in the power of co-operative effort to relieve the costs which city life entails."⁴⁵ The details were not nearly as important as the spirit.

The spirit bathed the arts as well. Largely as a result of Alfred Stieglitz's dedication, photography got its aesthetic mooring in the twentieth century. Master and patron saint of the new form, Stieglitz considered "The Steerage" (1907) to be his finest work. It was done in the warmth of bright daylight, the most hopeful of all materials upon the most hopeful of all native subjects, the immigrant, the ultimate optimist. In the year of "The Steerage," immigration reached the highest point in the country's history, more than a million and a quarter human beings.⁴⁶

The tapestry of American zoning is shot through with these sometime "strangers in the land."⁴⁷ They appear in the late nineteenth-century as new arrivals and they are there in subtler form a hundred years later.

Given a long enough wait, most things come as grist for the law's mill. During the same years in which Spencer was unfolding his cosmology in lengths of geological time, American courts were dealing with a more immediate concern, dirty linen.

Between 1870 and 1890 a good deal of San Francisco's laundry was done in several hundred Chinese establishments. As John Higham writes, during these years "No variety of anti-European sentiment has ever approached the violent extremes to which anti-Chinese agitation went . . . Lynchings, boycotts, and mass expulsion still harassed Chinese after the federal government yielded to the clamor for their exclusion in 1882."⁴⁸

With strong overtones of nativism, a line of germinal lawsuits went to the tribunals of California and into the Supreme Court of the United States. Known unwhimsically as the "Laundry Cases," they often arose in San Francisco and typically involved the imprisonment of a Chinese laundry operator for violating local laws regulating the location of shops and pro-



10. The Flatiron Building, 1905. PHOTO. BY EDWARD STEICHEN. PHOTOGRAPHY COLLECTION, MUSEUM OF MODERN ART.

hibiting night work. In such a control of location lay one of the fundamentals of zoning—the idea of land use segregation in designated districts of a city.

The buildings were usually frame structures. Upon that basis the City Council rested its use of the police power, asserting that laundry regulation was a form of fire prevention. “The fact that the laundry buildings were becoming the clubs of the Chinese added to their objectional features in the popular mind, and stirred the legislative body to drastic action.”⁴⁹

In 1885 two of these cases went to the Supreme Court of the United States. In both *Barbier v. Connolly*⁵⁰ and *Soon Hing v. Crowley*,⁵¹ the Court upheld San Francisco’s regulations despite the shopowners’ claims that they were being deprived of their property without due process. Their property was the right to work unrestricted hours. Testing the legality of his imprisonment, Soon Hing also urged that the controls were an expression of the hatred and antipathy which San Franciscans were directing against the Chinese, trying to force them to quit the city.

The same complaint against the same kinds of regulations persisted into the early twentieth century, and in 1911 a court again rejected it in a case challenging a Los Angeles regulation.⁵² It sounded remarkably like the bakery owner’s argument in *Lochner* but brought a different result.

The immigrant is in the fiber of zoning. He appeared first as an Oriental. In early twentieth-century New York he is seen as a southeastern European, the lower East Side garment worker whose presence in midtown Manhattan created one of the decisive moments in the history of zoning.

If the nation’s new religion at the turn of the century was expressed in its worship of power and material things, the skyscraper was its icon. Some of the finest altar panels were photographs.

Stieglitz transformed the immigrant. Edward Steichen transformed the skyscraper. It was art and something else. “The Flatiron Building” (1905) is a masterful study of the nineteenth century departing (Fig. 10). Reined by a top-hatted coachman, the old era drifts into an impressionistic mist. Looming out of streets shimmering like a gliding sea is the immense prow of a vessel knifing its way into a new time in the United States.

For a journalist of the period, the building dominated Madison Square like “an ocean steamer with all Broadway in tow.”⁵³ Stieglitz, who had made his own superb studies of the new building was transfixed. “It looked . . . as though it were moving toward me like the bow of a monster ocean-steamer—a picture of the new America that was still in the making.”⁵⁴



11. New York Ferry, 1907. PHOTO. BY JOSEPH T. KEILEY. METROPOLITAN MUSEUM OF ART, GIFT OF ALFRED STIEGLITZ, 1933.

Yet another prospect is Joseph T. Keiley's "New York Ferry" (Fig. 11), published in 1907. It is uniquely the American horizon. Stieglitz's "The City of Ambition" (1910) seems to make it reachable (Fig. 12). Taken on the eve of zoning's birth, this portrait of lower Manhattan's building masses trumpets the might and weight of the driving enterprises which brought the city into the twentieth century.

Stieglitz and Steichen seized the skyscraper whole. In a group of water colors of the rising towers of the new Singer and Woolworth Buildings on



12. The City of Ambition, 1910. PHOTO. BY ALFRED STIEGLITZ. GEORGE EASTMAN HOUSE COLLECTION. ALFRED STIEGLITZ ESTATE.



13. Singer Building tower under construction, 1908. Lower Broadway, St. Paul's in the foreground. Taken from the old Post Office roof. An elevated view of the prospect John Marin treated in his water color, "St. Paul's Lower Manhattan." LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.



14. St. Paul's Lower Manhattan. One of John Marin's water colors exhibited at the Armory Show. WILMINGTON SOCIETY OF THE FINE ARTS, GIFT OF JOHN L. MCHUGH.

lower Broadway, John Marin released their energies by shattering the mass (Figs. 13, 14). The paintings were hung at the International Exhibition of Modern Art, which opened in New York in February 1913. Less than two weeks later the city took its first formal step toward zoning.

The Armory Show, the most important exhibit of art in the United States in the twentieth century, "set in motion forces which eventually transformed the character of American art."⁵⁵ Marin felt the beat. "I see great forces at work, great movements . . . I can hear the sound of their strife, and there is great music being played."⁵⁶

Much of the music Marin heard was in the skyscraper. For decades it has been loved by some, hated by others, but stimulating to everyone. Intense excitement describes the course of its growth. The eruptive development of the skyscraper—the tall office building—was an elemental force which helped set zoning in motion early in the century.

The architectural scholar sees the skyscraper as “probably the greatest single innovation in nineteenth-century architecture.”¹ The student of language may well regard it as an American artifact which released one of the mightiest gushers of metaphor: “. . . inconceivable spires of Manhattan . . . The forms of ‘gypsum crystals,’ a giant’s cromlech, a mass of stalagmites, ‘the Cathedrals and Great White Thrones of the National Parks,’ an Arizona mesa, a ‘ship of living stone,’ a petrified forest, ‘an irregular tableland intersected by shadowy cañons,’ a mastodon herd, ‘a pin-cushion,’ the Henry Mountains in Utah, ‘a vertical aggregation,’ dividends in the sky . . . ‘the winning of a game: proclamation by skyscraper.’”²

The industrial revolution made it technically feasible. A Chicago architect rhapsodized its metaphysics and shaped some of its most eloquent examples. New York added the fiercest drives for spectacular gain, a dash of megalomania, and something of the hunger for immortality which gnawed at the pyramid-building pharaohs.

Demonstrating anew that accelerating change is the one durable legacy America took from those hundred years, the nineteenth century refined the fuel of technology. By the latter half of the century the nation’s economy was in a position to exploit the technology of iron and steel which had developed through the European and American process inventions of steel

alloys (1822), hot blast in iron production (1828), manganese steel (1839), open-hearth furnace (1856), and the Bessemer converter (1856).³

The products of these innovations were rigged into a new kind of structure, variously known as the steel-frame building, cage, or skeleton construction. Drawing upon the new techniques of steel work which began appearing in nineteenth-century bridges, the new structure placed the weight of the building on its steel skeleton rather than on ground supports. Apparently unaware that Jules Saulnier had designed the first steel-frame building (a chocolate works erected near Paris in 1871–1872), several American architects claimed its invention.⁴ The first completed American application of the principle was William LeBaron Jenney's ten-story office building for the Home Insurance Company. It was finished in 1885 on the northeast corner of LaSalle and Adams Streets in Chicago and answered the company's demand for a novel type of building which was both fireproof and able to maximize light for all its rooms.

Some ten years before Jenney designed the structure he had given brief employment to young Louis Henri Sullivan. Born in Boston in 1856, Sullivan spent a year at the Massachusetts Institute of Technology where he found academic study irksome. He withdrew from formal education, went to visit his grandparents in Philadelphia, and quickly sought work with the architectural firm of Furness & Hewitt because he had seen a nearly completed residence which they had done. It struck him "like a flower by the roadside,"⁵ and he found a job briefly under Frank Furness. Furness "made buildings out of his head . . ." ⁶ and held his young admirer hypnotized by his power to swear and draft simultaneously. In a city rich with a long, quiet tradition of architectural excellence and variety, Furness is now regarded as "the most original architect that Philadelphia produced, prior to the twentieth century. . . ." ⁷

Guilt by association is a dubious principle, but Sullivan's career supports the notion that something can be said for the power of association to draw out brilliance. His remarkable native talents were fed by constant dealings with architects and engineers who, along with him, created what has come to be called the Chicago School of Architecture.

Like Frank Lloyd Wright, who apprenticed with him and called him *der Meister*, Sullivan was gifted with a genius for making superb buildings and frequently nonsensical prose. His writing characteristically moves with flashes of vivid clarity which suddenly turn into an impenetrable fog of

mysticism suggestive of two of Sullivan's heroes, Walt Whitman and Richard Wagner.

An abundant literature has grown up around Sullivan's life and work. None of it improves upon his own writings about the skyscraper. Important in the genesis of his theory of the skyscraper was the fact that he made his career in the city that spawned the structure. His work was coming to full maturity at the time the Home Insurance Company building was raised. Leaving Furness's office because the panic of 1873 dried up architects' commissions, Sullivan headed for Chicago. It was a city just emerging from the devastation of the great fire of 1871. Sounding rather like a Brigham Young coming upon the valley of the Great Salt Lake, he arrived with the exclamation: "THIS IS THE PLACE FOR ME!"⁸

The Autobiography of an Idea is Sullivan's third-person account of his early life. It was published in 1924, the year he died in tragic destitution. What he found in Chicago upon his arrival he described in the following passage:

As everybody said: "Chicago had risen phoenix-like from its ashes." But many ashes remained, and the sense of ruin was still blended with ambition of recovery. Louis thought it all magnificent and wild: A crude extravaganza: An intoxicating rawness: A sense of big things to be done. For "Big" was the word. "Biggest" was preferred, and the "biggest in the world" was the braggart phrase on every tongue. Chicago had had the biggest conflagration "in the world." It was the biggest grain and lumber market "in the world." It slaughtered more hogs than any city "in the world." It was the greatest railroad center, the greatest this, and the greatest that. It shouted itself hoarse in *réclame*. The shouters . . . bragged: "We are the most heavily mortgaged city in the world." Louis rather liked all of this. . . . These men had vision. What they saw was real, they saw it as destiny.⁹

He went briefly to France to study at the Beaux Arts and came back burning to find in architecture what a French tutor promised to present in mathematics: "*demonstrations . . . so broad as to admit of NO EXCEPTION.*"¹⁰ He said that the germ of the universal principle came to him in a three-day visit to Rome, most of which he spent at the Sistine Chapel communing with a "Super-Man . . . a man who had *done things in the beneficence of power.*"¹¹

What he developed from Michelangelo's example became a canon of twentieth-century architecture: form follows function. He reached the

principle by expanding his fascination with steel bridge building techniques into broad fields of science. He read extensively. "In Darwin he found much food. The Theory of Evolution seemed stupendous." ¹² Spencer moved him too.

Montgomery Schuyler, probably the finest architectural critic the United States has produced, was one of the few contemporaries to appreciate Sullivan's genius. Henry-Russell Hitchcock's standard *Architecture: Nineteenth and Twentieth Centuries* acclaims Sullivan "the first truly great modern architect not alone of America but of the whole western world." ¹³

The development of Sullivan's thought occurred in what has sometimes been called the most American of cities. The swift rate of building in Chicago after the 1871 fire was fueled by a commerce without pretension. What particularly struck Schuyler was the kind of demand the Chicago businessman made on his architect, an extremely impatient, yet financially generous insistence on purely utilitarian structures. It was not that the wants of Chicago businessmen were totally and selfishly private. On the contrary, Schuyler found them the most public-spirited merchants of any commercial city in the world. They simply would not perform their civic acts during business hours. ¹⁴

Sullivan and the developing Chicago School understood these conditions of work very well. They accommodated to them, built no-nonsense structures, and made no excuses for their works. Such an attitude takes financial and technological power as unembarrassing fundamental qualities of American civilization. Along with these materialistic realities, it absorbs the beliefs and expectations of the culture and turns them into an "organic architecture." It is an architecture which takes a deep pride in being close to the people, whatever that may mean.

The application of this aesthetic to the skyscraper was one of Sullivan's most important accomplishments. While he had built striking examples of what a skyscraper might be, his writing is even more relevant to what, by 1903, Schuyler was calling "The Skyscraper Problem." ¹⁵

In his essay, "The Tall Office Building Artistically Considered" (1896), Sullivan deals with the essentials of an ideal skyscraper. He begins by summarizing the conditions which create the demand for tall buildings—technology, population growth, congestion, and rising land values. Characteristically enough, rather than question either the merit or the implications of this intensifying process, he simply accepts it as a fact of life to be lived



15. Louis Sullivan's unexecuted design for the Fraternity Temple, 1891. MUSEUM OF MODERN ART.

with and turns to the question of the skyscraper. "Problem: How shall we impart to this sterile pile, this crude, harsh, brutal agglomeration, this stark, staring exclamation of eternal strife, the graciousness of those higher forms of sensibility and culture that rest on the lower and fiercer passions? How shall we proclaim from the dizzy height of this strange, weird, modern-housetop the peaceful evangel of sentiment, of beauty, the cult of a higher life?" ¹⁶

The *Autobiography* gives poetry to the skyscraper and withdraws it. "The appeal and the inspiration lie, of course, in the element of loftiness, in the suggestion of slenderness and aspiration, the soaring quality as of a thing rising from the earth as a unitary utterance, Dionysian in beauty. The failure to perceive this simple truth has resulted in a throng of monstrosities, snobbish and maudlin or brashly insolent and thick lipped in speech; in either case a definition and denial of man's finest powers." ¹⁷

He put the skyscraper in its larger urban setting. "The tall steel-frame structure may have its aspects of beneficence; but so long as a man may say: 'I shall do as I please with my own,' it presents opposite aspects of social menace and danger. For such is the complexity, the complication, the intricacy of modern feudal society; such is its neurasthenia, its hyperesthesia, its precarious instability, that not a move may be made in any one of its manifold activities, according to its code, without creating risk and danger in its wake . . ." ¹⁸

Sullivan had in mind a kind of building which was to anticipate the architectural impact of setback provisions in New York zoning law. It appeared in a drawing (1891) of his Fraternity Temple (Fig. 15), a 35-story tower rising from stepped masses of 10- and 21-story structures. Massive at the base, yet lofty, slender and soaring from its center, it would satisfy the architectural imagination and yet would not steal the light and air from its neighbors. It was never built.

Sullivan believed that Chicago architects were hospitable to the steel frame and knew what to do with it. But New York had corrupted the structure. "In fact, the tall office buildings fronting the narrow streets and lanes of lower New York were provincialisms, gross departures from the law of common sense. For the tall office building loses its validity when the surroundings are uncongenial to its nature; and when such buildings are crowded together upon narrow streets or lanes they become mutually destructive." ¹⁹

The tensions in Sullivan's attitude toward the skyscraper were the tensions to be found in many turn-of-the-century Americans. They believed in democracy because it permitted men to realize themselves as individuals, and yet the expansive individualism of which Sullivan's life was a prime example could lead to socially malignant conduct as well as great architecture.

At virtually the same time Sullivan had gone off to make his career in Chicago, New York had begun to create its skyline. Starting in the early 1870's and for more than four of the following decades, skyscraper builders did what they pleased with their own. In 1916 the law tried to deal with the consequences in the form of zoning controls.

For some 250 years after the Dutch made their arrangements with the Indians, New York had grown by spreading rather than rising. In 1626, the earliest view of New Amsterdam reveals sailing vessels standing off the

16. The earliest view of New Amsterdam (1626?). Governor's Island at left. In the original, incorrectly engraved, the topography was reversed. LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.





17. New York, 1836. Aquatint by J. W. Bennett after J. G. Chapman. LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.

southern tip of the island (Fig. 16). In the distorted perspective they overtower the tallest land structure, a windmill on the western shore. A small fort (drawn by the artist-engineer Cryn Fredericksz although never completed) and a handful of small houses are sprinkled across the end of Manhattan.

About two centuries later the appearance of what would one day be the greatest urban prospect in the United States remained essentially horizontal (Fig. 17). Despite the few church steeples and the masts of ships lying at berth, the sky was uninterrupted and vast. For yet another quarter of a century street scenes and the then traditional bird's-eye views of the island document the outward rather than upward growth (Figs. 18-22). At the southern end buildings had grown to both rivers and across them in



18. New York from the steeple of St. Paul's Church looking east, south, and west, 1849. Aquatint by Henry Papprell. LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.

19. Trinity Church looking northwest, showing the west side of Broadway, 1850. ENO COLLECTION, NEW YORK PUBLIC LIBRARY.







22. Bird's-eye view of New York City from Brooklyn. The Jersey shore is in the distance. ENO COLLECTION, NEW YORK PUBLIC LIBRARY.

20. (*top, facing page*) Bird's-eye view of New York City looking north (1857). Governor's Island at lower right; the hook opposite is the Jersey shore. Castle Garden is connected to the mainland by a bridge. The East River is shown to Long Island Sound. ENO COLLECTION, NEW YORK PUBLIC LIBRARY.

21. (*bottom, facing page*) Bird's-eye view of New York City, 1853. From *Frank Leslie's Illustrated News*. LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.

Brooklyn and to the Jersey shore. The northern movement was well under way, but the building tops remained close to the ground as they had since the Dutch settlement.

The end of the Civil War opened a building boom in New York City. In 1865 the city almost doubled the number of buildings erected the previous year. It was, however, still a city of relatively low-lying structures, four to five stories high (Fig. 23).²⁰ Yet even then the volume of building

23. New York and environs, 1867. Detail of the Battery. ENO COLLECTION, NEW YORK PUBLIC LIBRARY.





24. Elisha Graves Otis demonstrating the world's first safe elevator at the New York Crystal Palace Exposition, 1853. OTIS ELEVATOR CO.

activity was the herald of one of New York's unique contributions to the skyscraper, intense development.

In addition, New York made one other special contribution to the skyscraper's growth, the elevator. Elisha Graves Otis introduced the world's first safe elevator in a demonstration at the New York Crystal Palace Exposition in 1853. It was held at Bryant Park behind what is now the site of the New York Public Library at Forty-Second Street and Fifth Avenue. Otis dramatized the reliability of the new device by repeated demonstra-

tions in which, having been pulled aloft, he would cut the hoist rope, come down to a safe stop, and call out, "All safe, gentlemen!" (Fig. 24).

Otis installed the first passenger elevator in E. V. Haughwout's new department store on the corner of Broadway and Broome Street in 1857. There was a second and somewhat more celebrated installation in 1859 at the new Fifth Avenue Hotel on Broadway between Twenty-third and Twenty-fourth Streets. It was known as a "Vertical Screw Railway" and worked on the principle of an artesian screw threaded into a groove in the car.²¹ It took ten years for developers to appreciate the possibilities of using the elevator in the commercial office building.

The Equitable Building at 120 Broadway (1870) introduced an elevator into the original design. The history of this lower Manhattan building and its successor on the same site brackets the beginning and end of the skyscraper's pre-zoning era. By disclosing the possibility of elevators in office buildings, the first Equitable Building started the break-out from the traditional five-story maximum. The following Equitable Building carried the development of the skyscraper to such intolerable extremes that, beyond any other structure, it may be isolated as the one building which was a final cause of zoning law.

With some borrowed office furniture, a box of cigars, and a large sign as his props, in 1859 Henry B. Hyde founded the Equitable Life Assurance Society of the United States. Ten years later it was outselling every other insurance company.

Hyde pressed to have a new Equitable Building built to seven instead of the usual five stories. Despite the skepticism of both his board of directors and real estate agents, he prevailed. Before the new building at 120 Broadway was completed, its consulting engineer, George B. Post, offered to lease a suite on one of the top stories for a rental equal to that of the best office accommodations on Broadway. Hyde demanded twice what Post offered. Post accepted and later sold his lease at a profit.

The local press promptly appreciated some of the practical implications of this novel building, soon to be occupied by a "swarm of lawyers and others six layers deep . . . If you call a lawyer—instead (as now) of throwing away time, rupturing blood vessels, and losing your wind by clambering up dark staircases—you walk directly from the street into one of the handsome vertical steam cars." ²²

Some cast a sharp eye beyond these obvious immediate advantages and

into the future. "Now is the opportunity for some enterprising New Englander to buy a lot twenty by fifty and put up a building on it as high as Trinity Church steeple, with a line of steam elevators running every five minutes. Thirty floors, with two rooms on each floor, will be about the available office room of the structure; and the proprietor might rent out the roof either for an astronomical observatory, a shot tower, or a light house, as best accorded with his fancy."²³ It was not too long before someone added the idea of the executive suite.

New York's first steel-frame structure (1888–1889) was the Tower Building at 50 Broadway (Fig. 25). It was built some four years after the pioneering example of the Home Insurance Building in Chicago. In the nearly twenty years which spanned the completion of the Equitable and Tower Buildings, New York pushed its new commercial office buildings to record-breaking heights for that city. It happened without any demonstrable regard for the wider public consequences of the trend.

The example of the first Equitable Building stimulated the building of new elevator structures as well as conversions of existing buildings. There were also remodelings which added extra stories. The Western Union Building at 195 Broadway opened in 1873 and topped Equitable's 130 feet by another hundred. In the same year the *New York Tribune* filed and eventually completed plans to remodel its building to 260 feet.

In less than ten years after the Civil War plans were afoot to quadruple what had been the average sixty-foot height of the city's commercial office buildings. An observer suggested that "Excelsior," the official motto of New York State, might well have served the ambitious builders. A student of the tall buildings of this period accurately concludes that economics was the paramount factor in pushing up the height of New York's office structures. "It cannot be overemphasized that space in these buildings was conceived as a commodity to be sold at a profit. And it was the pursuit of profits that largely motivated businessmen 'to build up to the clouds' as the *Graphic* put it."²⁴

By the time the Tower Building rose to its eleven stories in 1888–1889, the limits of traditional masonry bearing-wall construction had about been reached in Chicago's historically important sixteen-story Monadnock Building (1889–1891). It was the monumental conclusion of its type. A rule of thumb used by Chicago architects of the period suggests the physical demands of bearing-wall construction. New York's building code made com-



25. The Tower Building (1889-1914). Bradford Lee Gilbert, architect. New York's first steel-frame building. BYRON COLLECTION, MUSEUM OF THE CITY OF NEW YORK.

parable ones. Such a wall had to be at least twelve inches thick for the first story of the building. Every additional story added another four inches. The practical limit was usually ten stories, which required a wall four feet thick at the first floor.²⁵ At its base, an extraordinary building like Monadnock had fifteen-foot piers.

Since it carried all its weight on the walls, such a structure lost most of its office space at the lower levels where the wall was thickest. For the owner, the galling fact was that this part of the building commanded the highest rents. Thus, until the steel frame appeared, seemingly immutable structural principles curbed the economic appetite.

The steel frame, in effect, repealed this restraint and the law offered no substitute. Quite literally the sky became the limit, and with the erection of the Tower Building the final race in New York was under way. The steel frame shifted the building's load from its walls to the frame, thus freeing it from its dependency on masonry piers. Lewis Mumford suggested that on a twenty-foot lot (about the size of the Tower Building lot) more than a quarter of the width of a ten-story bearing-wall building would have been lost to its lower floors. "The possibilities of masonry and the possibilities of commercial gain through ground-rents were at loggerheads, and by 1888 masonry was defeated."²⁶

During the same era which saw the invention of the steel frame and the elevator other technical innovations appeared. They raised the potential of the skyscraper to its critical mass. Edison furnished the means for spinning the web of energy in which the modern city is suspended. Between 1883 and 1913 electricity was distributed to virtually every street in Manhattan. Indeed, when Tower was built, electric rather than gas illumination in new buildings was the rule. Plate glass, essential for the strength of high-altitude windows, was in mass production by 1881. Rapid communication is the nervous system of large enterprises. The telephone was probably as vital to the growth of the skyscraper as the elevator (Figs. 26, 27). It was available by the 1870's. By the mid-1890's New York was averaging one hundred and fifty thousand calls a day and long distance calling was an actuality. Every bit as important to the skyscraper as these new technics were great aggregates of wealth to finance them. The phenomenal post-bellum growth of private and corporate fortunes assured adequate funding.

All of these tangible factors were clear enough. Yet they were only conditions without which the skyscraper could not have happened. The final



causes were to be found in men, not things. There were, after all, many large urban areas in western Europe which could command the great resources necessary to raise the skyscraper. Yet it did not appear there and in other areas of the world for another half-century.

Despite sometimes violent economic disruptions in the business cycle, the fact is that no culture of the time had as wide a belief in the limitless possibilities of its power, especially its economic power, and so little desire or will to restrain it publicly as America. It is a period which was actually

26. (*facing page*) Telephone lines at Broadway and Maiden Lane, c. 1885. The old Post Office in center background. NEW YORK TELEPHONE CO.

27. Traffic operators ("Hello Girls") in the central telephone office, New York City, c. 1888. AMERICAN TELEPHONE AND TELEGRAPH CO.



beginning to build its own version of castles in the air, castles whose towers were dwarfing the steeple of Trinity Church at Wall Street and Broadway which had dominated the modest profile of Manhattan for half a century. Every such building confirmed and fired the nation's optimism and its extraordinarily developing energies. There seemed to be no practical limit to things and the skyscraper proved that. In 1909 Schuyler wrote that there had been nothing like the rise of the skyscraper in the history of human building. The closest comparison he could draw was with the birth of

Gothic architecture in northern France at the turn of the thirteenth century. A cynic, he thought, might discover motivations comparable to those which raised the great Gothic cathedrals in Paris, Chartres, Amiens and Rheims: "the faith in the dollar toward which [the nation] so plainly aspired, the fear of 'the hell of not making money.' " ²⁷

Something of the scorn which greeted Hyde's proposal to design the elevator into the Equitable Building appeared in the efforts to raise New York's first skeleton structure in 1888-1889, the Tower Building. John Noble Stearns, a silk merchant, owned a lot fronting about twenty feet along lower Broadway. It had a depth of more than one hundred feet. The city's building regulations imposed such a bearing-wall thickness that virtually no rentable space would have resulted at ground level. By moving the weight from its walls to the metal skeleton of posts and beams, like a steel bridge standing on end, the architect Bradford Lee Gilbert did away with the wall problem and opened enough of the narrow interior to induce Stearns to put up an eleven-story structure.

Legend, if not historical precision, has it that on an extremely gusty Sunday morning in 1888 a high wind was blowing through the building's exposed skeleton. An expectant crowd gathered on Broadway to see the

28. The skyline of New York, 1896, by Charles Graham. Probably one of the earliest pictures showing the impact of the skyscraper on the skyline. Previous views were usually bird's-eye. ENO COLLECTION, NEW YORK PUBLIC LIBRARY.



cage topple. Gilbert and Stearns appeared and, armed with a faith presumably born of Gilbert's knowledge of the Chicago experience and Stearn's financial expectations, they climbed to the top of the structure where they stood waving to the crowd below. In one account, Gilbert is said to have dropped a plumb line to prove how true the building was. Some years later Mrs. Gilbert is reported to have said: "On reaching the street, they marched up Broadway arm in arm, singing the Doxology, to the amazement of the parishioners of Trinity Church, who were just coming from morning service."²⁸

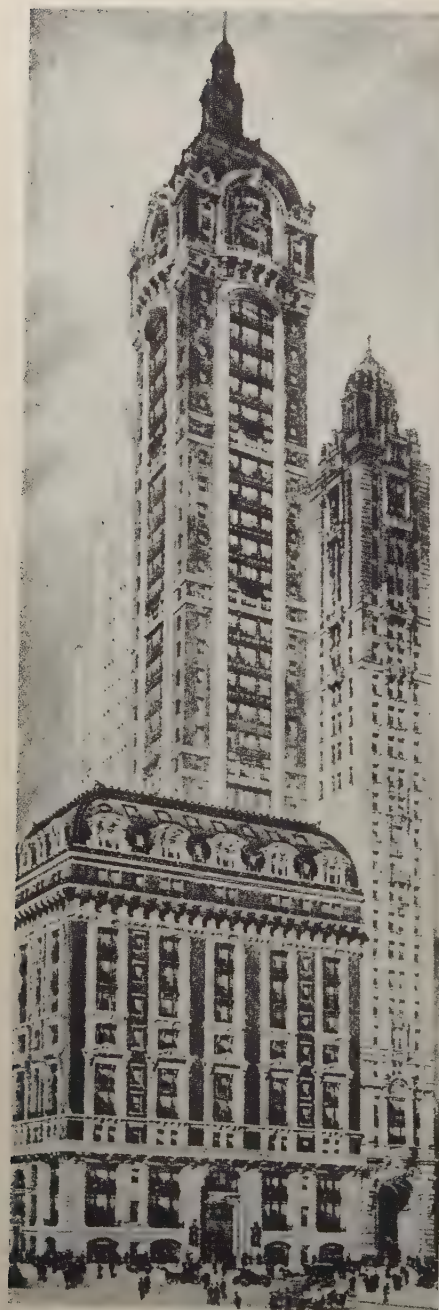
Within two years the Union Trust Building on Broadway and the Pulitzer or New York World Building on Printing House Square were up. Both had impressively surpassed the height of the Tower Building. Like Monadnock in Chicago, the tall World Building still had bearing walls, but that mode of construction was virtually finished in New York. The steel frame took command in what became the first of three great waves of New York skyscraper construction.

In 1894 the cross atop the steeple of Trinity Church at Broadway and Wall, for fifty years the highest point in New York, gave up its physical if not spiritual title to the Manhattan Life Insurance Building at 66 Broadway. The dramatic changes which were breaking out along the narrow streets in the business district of lower Manhattan led *Harper's Weekly* in 1894 to call the period "The Age of Skyscrapers." In 1896 the words "sky line" appeared, apparently for the first time, in a picture title for Charles Graham's drawing (Fig. 28).²⁹

In 1907 the Singer Building on lower Broadway, which had seized John Marin's imagination, rose to 612 feet. Two years later the Metropolitan Life Insurance Company pushed a tower on the east side of Madison Square to 700 feet (Figs. 29a, 29b). In another four years the Woolworth Building, still one of the commanding features of the skyline today, surpassed the Metropolitan Tower by nearly another hundred feet.

The scale and rate of building had been phenomenal. In less than two generations since the first Equitable was built, the skyscraper had completely transfigured lower Manhattan from a horizontal to a vertical city (Figs. 30a, 30b).

Of all the representative works of that era, two stand supreme, the Woolworth and Equitable Buildings. Their architecture and the circumstances in which they were made embodied the cult of the self-made man,



29. The Singer Building (left) and the Metropolitan Life Building (right).
OTIS ELEVATOR CO.

the glittering religion of wealth and success, the energies of industrialism, and the lawlessness out of which many early twentieth-century American cities fashioned their inner hearts.

Woolworth was all gold. It was done on so grand a scale, done so audaciously yet with just enough of a trace of whimsy, that the spectacle of its making was more like the creation of a brilliant native art form than the raising of a building. Equitable was made from the base metal of the age.

Like millions of his turn-of-the-century countrymen, Frank W. Woolworth was an internal immigrant. He started on the farm and ended in the city. His life was one further demonstration that the unique American reward for bearing down hard and long enough on a simple idea is not bounty, but bounty without limit. Through unremitting work, a sobering share of early failure, and tough, ingenious merchandising, he transformed the "five-and-ten" into what, by 1909, was a chain of more than five

30. J. H. Beal's famous photographic panorama. (*top*) New York, 1876, with fewer than 1,000 elevators in use. The pier of the Brooklyn Bridge appears. (*bottom*) New York, 1908; more than 21,000 elevators in use. OTIS ELEVATOR CO.





31. The heart of New York, c. 1908. The skyline from Brooklyn. The Singer tower is under construction. LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.

32. Bird's-eye view of Manhattan north from the Singer tower, c. 1908. ENO COLLECTION, NEW YORK PUBLIC LIBRARY.



hundred stores across the nation and a new commercial empire developing in England.

In 1890 he displayed his finely developed appreciation of the opportunities created by population growth and urbanism. "I have been looking over a census of the United States and I am convinced that there are one hundred cities and towns where we can locate five-and-ten-cent stores, and we can sell a million dollars' worth of goods a year."³⁰

He traveled often on buying trips to England, where he was moved by the commercial possibilities of the country and the Gothic Revival architecture of the Houses of Parliament. By 1909 he had put his money where his dreams were and bought the first of several lots eventually assembled into a building site fronting on lower Broadway and City Hall Park.

Intending to build something as impressive as the tower of the Houses of Parliament, he originally wanted to raise a 12- or perhaps 16-story skyscraper to serve as headquarters for his company. But across the park was an irresistible challenge, the dome of gold of the World Building which Joseph Pulitzer had built as an unsurpassable monument to himself. Yet, even if Woolworth topped it the victory would be at best very local. Down Broadway stood the Singer Building, which went beyond Pulitzer's (Fig. 31). To the north on Madison Square soared the 700-foot Metropolitan Tower (Fig. 32).

At home and abroad, picture post cards and news articles about the Metropolitan Tower constantly taunted Woolworth with their revelations of the wonder of the world's tallest skyscraper. Bothered by the prospect of giving his name and substance to what might at best be merely the world's second highest skyscraper, he chose the only course open to his vanity and his deep instinct for trade. He ordered his architect, Cass Gilbert, to make a precise survey of Metropolitan's height and then beat it.

Some of the essential details of this resolution have been preserved in a useful journalistic autobiography published in 1936, "The Towers of New York" by Louis J. Horowitz and Boyden Sparkes.³¹ The value of the work lies in its frank discussion of the process by which decisions were made to put up buildings like Woolworth and Equitable. Both as a reporter of events and executor of decisions, Horowitz occupies a key role in the raising of the Woolworth and Equitable Buildings.

Horowitz came to the United States in 1892 as a seventeen-year-old immigrant from Poland. He started with a job as an errand boy at three

dollars a week, a figure which happened to be Woolworth's salary for his first job. At twenty-three he entered the real estate business by building small apartment houses in Brooklyn. By 1909 he was president of the Thompson-Starrett Company, the contracting firm which built the Woolworth Building and held claim to being the world's largest constructor of such great buildings as the Field Museum, the Continental and Commercial Bank, and the Conway Building in Chicago, and the Equitable and Gimbel Buildings and the present Waldorf-Astoria Hotel in New York.

Written in the midst of an age with a seemingly different social conscience than that of the early part of the century, the work has a curiously confessional quality. It reads as if Horowitz were seeking understanding and forgiveness for building against his principles. Something of this same mood of guilt permeates another autobiography of the thirties, *Changing the Skyline*.³² It was the work of Horowitz's principal competitor, Paul Starrett. After a brief interlude in the construction business with his brothers in Thompson-Starrett, Starrett left to join and eventually become president of the George A. Fuller Company. It was the contractor for the Flatiron and the Empire State buildings, among its other major activities.

Horowitz claimed that the original plans for the Woolworth Building called for a rise of 692 feet, eight short of Metropolitan's tip. But . . . "Woolworth had a secret. As he expressed it, he had determined to play a joke on the populace by keeping 100 feet 'up his sleeve.' By this device he meant to insure for himself for a longer time the glory of owning the tallest building in the world. It was, indeed, a startling piece of news when it was first announced that the finished structure would lack only eight feet of being 800 feet high."³³

The funding of so vast a project was enmeshed in Woolworth's plans for the future of his company. Then in the throes of elaborate merger negotiations, he wanted the building to be paid for as part of the stock arrangements in a merger. His investment bankers, Goldman, Sachs & Company, refused.

Nothing has the power of an idea whose time has come, and financing does not hurt. Woolworth decided to pay for it himself, in cash. For its time, this was unique in New York and probably in the nation. The building had neither a mortgage nor a dollar of any other indebtedness.

The prospect of such a gigantic new addition to Manhattan office space

anguished Horowitz, who tried to dissuade Woolworth from going ahead. Horowitz was certain that it would be a financial failure. "Then Mr. Woolworth let me into his secret—that there would be an enormous hidden profit outweighing any loss. He confessed that the Woolworth Building was going to be like a giant signboard to advertise around the world his spreading chain of five-and-ten-cent stores. On that basis, of course, his splendid building was a sound investment."³⁴

The construction of the lacy Gothic billboard was an extraordinary accomplishment. Its foundation had to be taken 120 feet to bedrock. Using a pneumatic caisson process, workmen gradually filled metal tubes nearly twenty feet in diameter with concrete to make the piers. In mid-November 1911, the steel cage appeared above ground. With no free storage space beyond the building line, steel girders so massive that their haul through Manhattan had to be laid out precisely to avoid street collapse, and with all the work being pushed in a heavily congested downtown area, workmen topped the steel work by July 1912, little more than seven months after it came above ground. Ten months later the entire building was complete.³⁵

Woolworth lavished his treasure on the public as well as the private areas. The three-story entrance arcade was laid on with honey-colored, veined marble quarried from the Isle of Skyros. Huge frescoes of "Commerce" and "Labor" adorned the second-floor balconies. Ceiling vaults were set with millions of sparkling glass mosaic tiles. Gold leaf dripped from delicate wrought-iron cornices. The total effect was a golden vision subdued by the concealed lighting over the Gothic elevator doors (Fig. 33).

He was a man of eclectic taste. He loved rich foods and overripe bananas too. He hated exercise and spent hours at the pipe organ in his Fifth Avenue mansion while he gave Horowitz intricate instructions on the details of the building. He had a singularly unbusinesslike attitude about the great sums in his personal financial accounts and often held out large checks for weeks before depositing them. Yet he could keep his confidential secretary and a building porter long after closing hours to help search his office for a lost quarter.³⁶

The executive suite of the new building was done in the same splendor but with a different taste from that applied in the public areas. Although he delighted in the Gothic exterior, the style of Woolworth's working quarters ran generally to Empire. He took the motif from Napoleon's library in the palace at Compiègne. One wall bore an oil portrait of



33. Arcade of the Woolworth Building. Glass mosaic ceiling vaults, honey-colored marble from the Isle of Skyros, Gothic elevator doors. THE AUTHOR.

Napoleon wearing the robes of his coronation, another a Flemish Renaissance tapestry. The mantel of carved stone enclosing the wood-burning fireplace was Italian Renaissance. He kept a life-sized bust of the French Emperor posing as Julius Caesar. While Napoleon settled for wood paneling, Woolworth's was marble. The decorative "W" replaced the "N."³⁷

The construction timetable and the opulence of the structure were no more remarkable than its dedication ceremonies. They were built around a great dinner, the owner's tribute to his architect, Cass Gilbert. It was probably without equal in the history of private American buildings.³⁸

After a reception on the building mezzanine, eight hundred guests assembled promptly at 7:30 P.M. on the twenty-seventh floor which had been converted into a great banquet hall. More than one hundred of them were congressmen and other nationally prominent figures whom Woolworth fetched from Washington on a special Pennsylvania Railroad train. The list of other guests fanned through a broad spectrum of American life from the two men who gave Woolworth his first three-dollar-a-week job in a Watertown, New York, dry-goods store to high financiers such as Otto Kahn. The memory of the muckrakers was alive in the person of Ray Stannard Baker, and Richard Harding Davis represented the finer literature.

On Broadway and in City Hall Park, keyed-up thousands waited. Above stairs the guests were now seated silently in the darkened banquet hall. Less than two months after he had excited the nation with his eloquent first inaugural address, Woodrow Wilson was about to add a new stimulus. A telegraph message went out to the White House and the President pressed a button starting dynamos which lit eighty thousand electric lights in the darkened building. The crowds on the streets gasped, then exploded into a roar. The guests on the twenty-seventh floor leaped to their feet and cheered. In realization of its owner's ultimate objective, the twinkling building could now be seen by potential customers forty miles at sea.

Lined with five wines and ten courses, the distinguished company settled back to enjoy the oratory. For the teetotalers there was Appolinaris; for the smokers, cigars; and for everyone, a touch of Herbert Spencer.

The master of ceremonies was F. Hopkinson Smith, a man of impressive parts. In a eulogistic piece written two years after the feast, the American Ambassador to Italy described Smith as "possibly the best raconteur and cleanest after-dinner talker at men's dinners in the city."³⁹ They were appropriate credentials for his tasks that evening. His other accomplish-

ments proved him to be a man who knew from personal experience a goodly portion of American life.

He was a successful engineer, contractor, and businessman whose projects included building the foundation and pedestal for the Statue of Liberty. During that period of his life he began to paint and do illustrations of such quality that the Corcoran Gallery acquired his work.

He was a remarkably prolific novelist, short-story writer, and essayist. In the year before the banquet he did the text and a group of delicate sketches for *Charcoals of New and Old New York*. It was a nostalgic piece which, ironically enough, had bitter words to say about the genus skyscraper and the forces which made it. "The Demon of Gain and Unrest,—that ruthless ogre which recognizes nothing but its own interest,—is responsible for this, the greatest monstrosity of our time." ⁴⁰

But that evening Smith put aside his disgust with tall office buildings and his yearning for the quiet backyards and quaint doorways of an older New York and spoke instead of Woolworth's achievement. He presented what was, in effect, a brief but sharp rebuttal to Wilson's first inaugural. Celebrating the doctrine of good works through wealth, he complained:

The attacks on our rich men are constant—quite persistent of late and from a high quarter. The criticisms are various, reflecting on the integrity of the owners, of their baleful influence on the growing generation and particularly on the fact that they crush out the smaller men, their motto being "The devil take the hindmost," not remembering that the devil ought to take the hindmost in a country like ours, where every opportunity is given a man to succeed and where those who lag behind and whine are those who have neither the courage nor the ability to fight their way to the front.⁴¹

Woolworth was diffident. He introduced his first employers and thanked his loyal workers. Then he saluted the captains of the legion which raised his building. As it turned out, they were excellent prototypes of those who made both the American skyscraper and many of the problems which the New York zoning code would shortly be expected to solve.

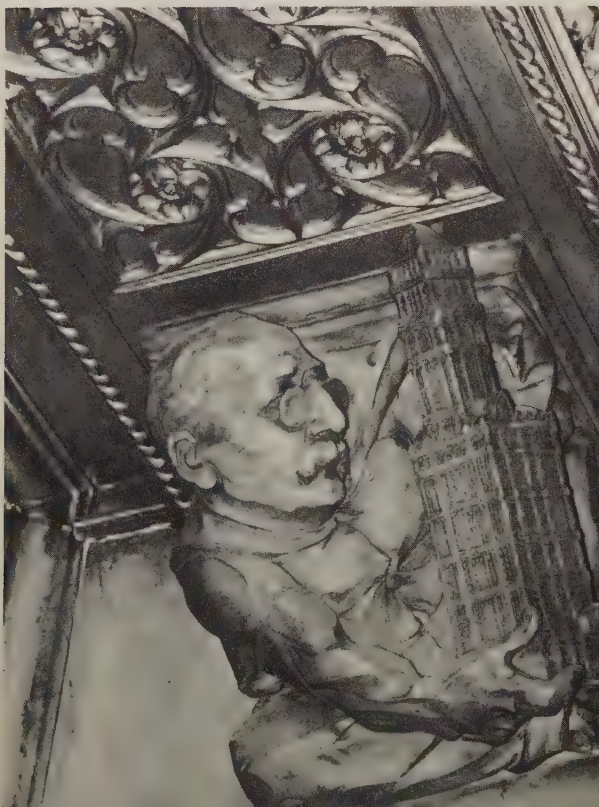
If architecture is "frozen music," some of the men whom Woolworth celebrated were permanently iced upon the crossbeams in the arcade of the building. They were architectural grotesques conceived by a member of Gilbert's staff who did them as a lark. Woolworth was delighted when he discovered them. The merchant prince lovingly fingers the magic object which made his giant business and therefore his building, an American

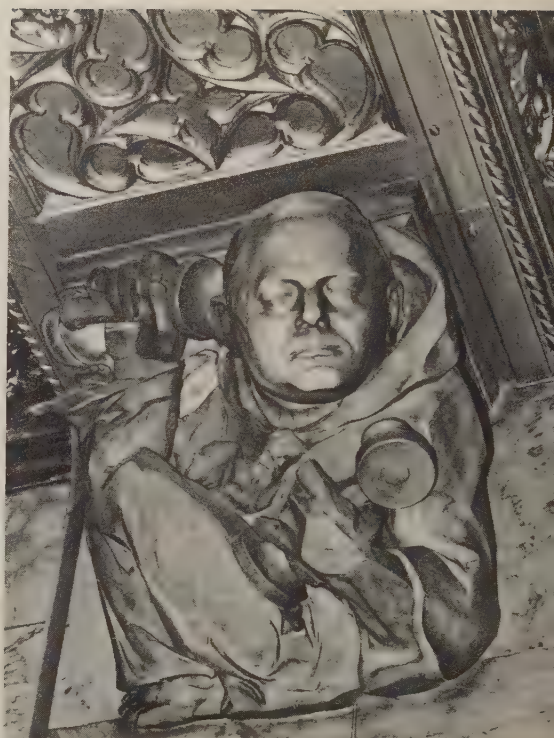
34. Grottesque of Frank W. Woolworth, nickel in hand, crouching under a golden crossbeam in the arcade of the Woolworth Building.

THE AUTHOR.



35. Grottesque of Cass Gilbert, architect of the Woolworth Building, contemplating the building model. THE AUTHOR.





36. (left) Grotesque of Gunvald Aus, examining a steel beam. He was chief structural engineer for the Woolworth Building. THE AUTHOR.

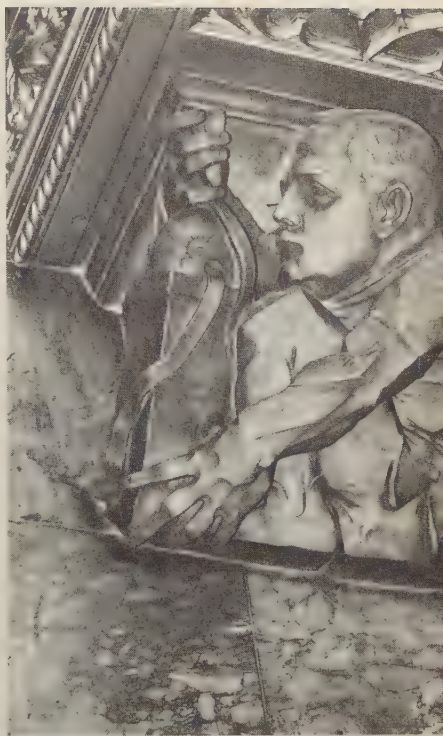
37. (right) Grotesque of Louis J. Horowitz in the Woolworth Building arcade. He was president of the Thompson-Starrett Co., contracting firm which constructed the building. THE AUTHOR.

nickel (Fig. 34). Cass Gilbert contemplates a model of his work (Fig. 35). The steel frame appears symbolically as a girder in the hands of Gunvald Aus, Gilbert's chief structural engineer (Fig. 36). The harried contractor big and capable enough to carry off the massive enterprise is Horowitz fused to a telephone (Fig. 37). Edward Hogan, the real estate agent, is clinching a deal (Fig. 38). The figure without whom the whole effort collapses financially is he who pays the rent. It is the banker Lewis Pierson, President of the Irving Bank and the building's first tenant (Fig. 39).

Having dwelled with obvious pleasure on the sheer height of the structure, Woolworth then introduced Cass Gilbert, the guest of honor. Gilbert



38. (*left*) Grotesque of Edward Hogan, the Woolworth Building's real estate agent, clinching a deal. THE AUTHOR.



39. (*right*) Grotesque of Lewis Pierson, president of the Irving Trust Co., the Woolworth Building's first tenant. THE AUTHOR.

saw parallels between his client and the great patrons of ancient art, the medieval Roman banker Chigi and the French and Italian financiers and wool merchants who made their cities beautiful. Gilbert received an enormous Tiffany loving cup decorated with letters of gold and an interior engraving of the building. Horowitz spoke next. What he said of Woolworth could have been said of the national mood. "Nothing seems impossible to him." ⁴²

At the speaker's table sat a representative of the arts, William Winter, a noted drama critic and man of letters. He opened with "Oh, brave new world, that has such people in it!" and closed with "The Artist," his own

eleven-stanza poem struck off for the occasion. Patrick Francis Murphy came on for the good clean fun. "Our host and guest represent a happy union of Commercial Genius and Architectural Art, like those suburban homes, semi-detached." ⁴³

The blend could have been concocted in no other part of the world and at no other time. Smith added the final ingredient. The building had the "lines of a great cathedral, its spire pointing to God. We are a serious people, and at times are open to serious influences." Admitting it was unusual (although a quarter of a century earlier Stearns and Gilbert had given him a precedent as they walked triumphantly away from the rigid steel frame of Manhattan's first modern skyscraper), he thought it fitting that the guests should "rise and sing the Doxology, in long meter." ⁴⁴ They did.

Schuyler hailed the huge Late Gothic pile as an architectural triumph. ⁴⁵ The Rev. S. Parkes Cadman, who later became one of America's first "radio pastors," saw it by summer morn "piercing space like a battlement of the paradise of God which St. John beheld . . ." It inspired "feelings too deep even for tears." He gave it the name it still carries, "The Cathedral of Commerce" (Fig. 40). ⁴⁶

A generation later Horowitz looked back upon his building career and wrote that throughout those years he had ". . . argued against extreme height and size. I emphasized the hazard against success from the standpoint of income to outlay. I was just as emphatic concerning the immorality of uncommonly big buildings. It should be obvious that an extraordinary large building poaches sunlight and air from smaller neighbors. London, Paris, aye, and Boston, do not permit the construction of buildings so large that they would hog a disproportionate share of the water supply, of sewers, sunlight, air and transport." ⁴⁷

Horowitz claimed that he made just such an argument to General Thomas Coleman duPont. Joined by two of his first cousins, duPont planned a newly incorporated family powder business. He became its president and was responsible for merging military powder plants into the great holding company, E. I. duPont de Nemours Powder Company of New Jersey.

The General was interested in diversifying his holdings. In January 1912 an opportunity came along when the old Equitable Building at 120 Broadway burned. In its ashes duPont quickly saw the outline of a new building.



40. The Woolworth Building more than half a century after completion. New York's City Hall is in the foreground. *THE AUTHOR.*

Following the fire, Equitable hired Horowitz's Thompson-Starrett Company to clear the burned structure from the site. An architect with an eye for the main chance asked Horowitz to meet with him and duPont to discuss a scheme to have duPont purchase the cleared site. Along with Thompson-Starrett, he would erect a new skyscraper. The architect who hatched the proposal would, of course, be commissioned to design the building. It turned out that, independently of this, for some time Horowitz had been actively seeking the construction contract for whatever would eventually be built at 120 Broadway.

The Equitable decided to sell the ground and duPont organized the Equitable Office Building Corporation to build the new structure. In August 1912 duPont and the new corporation made a contract with Equitable and in April 1913 the land transfer was completed.⁴⁸

Horowitz wrote that "duPont was fascinated by the idea of owning a gigantic building in New York."⁴⁹ Before it had a name he called it the "duPont Cottage." But Horowitz's examination indicated that the venture could proceed only if duPont laid aside ten million dollars. After some days of hesitation, duPont showed up at Horowitz's residence with a brace of ducks in one hand and ten million dollars' worth of duPont securities in the other. He proposed that Horowitz become his partner in the enterprise. Horowitz declined. He had no funds to contribute, and he doubted the wisdom of the investment. DuPont countered by offering to make a contribution as Horowitz's equity for looking after duPont's interest in the venture. He also tendered him a gift of 25 per cent of the stock in the new enterprise. Now Horowitz resisted on grounds that he could not serve two masters. That objection was cleared when Thompson-Starrett insisted that he accept duPont's proposal.

Then in a race against the imminent European sailing of Equitable's chief, the necessary legal documents were drawn and executed to put up the world's largest office building, the equivalent of some forty city blocks piled upon the one it would occupy at 120 Broadway. When it opened in 1915 it was in competition with the Woolworth Building and several other recent skyscrapers. Horowitz need not have worried about renting, for the outbreak of World War I created new demands for Manhattan office space.

It is clear that during this period whatever public concern may have touched the investor or the builder was never more than a rare twinge. As Horowitz confessed: "I argued against such buildings . . . but eventu-

ally I began to think of schemes for big ones by myself.”⁵⁰

Many of the objections to the Equitable Building came from men of great wealth who owned adjoining properties. They were as indifferent to larger public concerns as those who built Equitable. They feared that Equitable would so oversupply office space that it would ruin many of their own skyscraper investments in lower Manhattan. Horowitz relates that after the contract was signed, a committee of these owners requested that he influence duPont to complete the site purchase and then dedicate the ground as a park rather than erect the skyscraper. Horowitz called it a preposterous suggestion. They pleaded that the city needed a park and 120 Broadway was precisely the place for it. He challenged their sincerity, but was reassured that they meant what they said.

Very well, then, I will urge General duPont to abandon the building enterprise on one condition. He comes from Delaware and owes little to the city of New York, but with you who have always worked and lived here, the case is different. You are so rich you can afford to carry out your duty in this matter. Moreover, your adjacent property would be benefited. So I will put this before the General on condition that you will buy the plot, at cost, and commit yourselves by contract to dedicate it as a park.

That stopped all chatter; nothing more was said about a park.⁵¹

The city never did get a park at 120 Broadway. Instead it got what duPont was now cozily calling “Our Cottage” (Fig. 41). It was forty-two stories where nine had been before; a 35-million-dollar investment; one and a quarter million square feet of rentable office space for thirteen thousand workers and a stream of one hundred thousand people entering the building daily.

Practically all of the surrounding owners got reductions in their assessed valuations when they proved a loss of rents because of the light and air stolen by the massive new building. Its noon shadow enveloped some six times its own area. Stretching almost a fifth of a mile, it cut off direct sunlight from the Broadway fronts of buildings as tall as twenty-one stories. The darkened area extended some four blocks to the north.⁵²

In 1936 Horowitz was saying things about skyscraper building that were as harsh as anything said of them between 1913–1916 when they were cited as an evil to be controlled by zoning regulations. “Socially, the gigantic buildings are, to my way of thinking, quite wrong.” He deplored the consequences which such further building would impose upon public utilities



41. From the Woolworth tower, 1916. Massive structure at left is the Equitable Building. LIBRARY OF CONGRESS.

and upon street and sidewalk traffic, to say nothing of the added difficulties in renting them. "All these things add up to something which convinces me that no city ever was meant to contain the buildings of fabulous size, of fifty, sixty or seventy stories and more, that they have been attached like monstrous parasites to the veins and arteries of New York. Those who create such buildings, in my opinion, are taking unfair advantage of their neighbors, of their fellow property owners, of their fellow citizens."⁵³

Paul Starrett described early twentieth-century New York as "the place for the man who wanted to build skyscrapers." It was, he said, a time in which the spirit was "bigger and bigger," in which the prevailing business methods were ethically questionable, and a time which set the pattern of speculation and manipulation that built the modern American city.⁵⁴

In none of this sometimes exotic, always frenzied activity is there a suggestion that the men involved in making the skyline of New York thought about the public weal or even about the owner in the next block. The *Dictionary of American Biography* says of William A. Starrett, yet another master builder of the American skyscraper, what might well be said of the entire process. Like him, it was "completely oblivious to all city-planning values except the financial."⁵⁵

On an afternoon at the end of April 1907, Robert Grier Cooke invited a group of business friends to a meeting in a parlor of the Fifth Avenue Hotel. Cooke, then in his early forties, was a Lehigh University Phi Beta Kappa who had worked on the staffs of the *New York Tribune* and *The Sun*. Following associations with several New York publishers, in 1902 he founded his own house, specializing in the production of finely made books the best known of which was a catalogue of the Morgan Chinese porcelains. In 1907–1908 his business fell into financial difficulties, he went bankrupt and devoted the rest of his life to impressive service for the Fifth Avenue Association, the organization which came out of the 1907 meeting. He lived at the old Waldorf-Astoria at Thirty-fourth and Fifth and died there in 1924.¹

Like the skyscraper, both the Fifth Avenue Association and the street from which it took its name were essential materials out of which zoning was made. Besides Cooke, early founders of the association included the brothers Lawrence and Douglas L. Elliman (real estate), Simon Brentano (books), William Knabe (pianos), Roland Knoedler (art), Arthur Melvin Hatch (banking), Louis Kilmarx (interior decorating), John S. Holbrook (jewelry and silverware), and William Mitchell Kendall (architecture).

Cooke developed a skillful campaign of association publicity through his frequent public speaking engagements and versatile appearances in the daily press both as subject and author. As a result of such efforts as well as pressures upon the city government, the association became Fifth Avenue's self-appointed *arbiter elegantiae*. It was transformed into one of a special group of American organizations which make and shape events

to a particular view of experience and then bend them into law. The events were myths and realities of Fifth Avenue.

Cooke's meeting place, the white marble Fifth Avenue Hotel, opened in 1859. Its original owner, a risk-taking New Englander named Amos R. Eno, fixed on the northwest corner of Twenty-third Street and Broadway in the face of popular ridicule that "Eno's Folly" was so far uptown that it would only be used as a summer resort.² Six years earlier on the same site, Francini's Hippodrome, with walls of brick and roof of wood and canvas, had failed in its attempt to supply New York with a permanent Roman carnival *cum* gladiators and chariot races.³ It lacked only lions and early Christians (Fig. 42).

On the ground floor of the hotel, Henry Maillard's Retail Confectionery and Ladies' Lunch Establishment did business. Sweet with the fragrance of its famous chocolate, Maillard's housed under its ornate ceiling richly carved showcases laden with delectable confections in the shapes of flora and fauna.⁴ The Fifth Avenue was also rich with mood-setting memories which made it appropriate for a group of businessmen who were meeting to lay large plans.

When the hotel opened, its private bathrooms and the "Vertical Screw Railway" serving all six stories were special innovations. Its cosmopolitan splendor quickly drew to its street-floor public rooms a bustle of glittering figures from New York's social, financial, and political worlds. The following year, with a crucial presidential campaign being fought out over a great national issue, New York society refused to honor the incognito of nineteen-year-old Baron Renfrew (in truth the Prince of Wales and Edward VII-to-be) and threw him a ball of the grandest proportions. Such nights as New York's first royal visitor spent in a hotel, he spent at the Fifth Avenue.⁵

Through the end of the century and into the new one, the Fifth Avenue occupied a special place in the landscape of New York's Republicanism. For many years Senator Thomas C. ("Boss") Platt held court there in the "Amen Corner," so named for the responses Platt's cronies rendered when the "Boss" issued instructions.⁶

Cooke called the meeting two years before the hotel was demolished on the tide of fashion and urban elegance running up Fifth Avenue. Bound together by the location of their businesses, the men at that first gathering met to deal with a group of developments some of which were mutely

suggested in the fading glory of the hotel which parlored them. The avowed purpose of the gathering was "to foster, promote, maintain and encourage the civic, social, commercial and industrial welfare of the city, particularly with relation to the Fifth Avenue section." They pledged its achievement by getting "every possible advantage from the municipal and private interests for the betterment of trade and traffic conditions on the Avenue." ⁷

What was happening before their troubled eyes was the passing of a remarkable parade up Fifth Avenue on a route which was laid down in 1811, formed up in the 1820's, and was now marching by them at a pace

42. Franconi's Hippodrome, 1853. Madison Square, northwest corner of Broadway and Twenty-third Street. EDWARD W. C. ARNOLD COLLECTION. LENT BY THE METROPOLITAN MUSEUM OF ART. PHOTO. COURTESY MUSEUM OF THE CITY OF NEW YORK.



which hastened with each year. The men in the parlor, and those who were shortly to join them in growing and powerful numbers as the Fifth Avenue Association, feared that their own best commercial interests would be trampled to death by what was coming up the avenue: change.

It was of a piece with the turbulence in the country at large—soaring hope, crude exploitation of men and things, strident materialism, large and undisciplined energies—although in its detail no other street in the land concentrated so many pretensions, possessions, and perversities in so relatively brief a period.

The stretch of the avenue which begins at Washington Square and courses up the east side of Central Park changed its physical character, its urban function, and its symbolic value through three eras. The first closed during the mid-nineteenth century. The second and third eras bridged the turn of the century. The Cooke meeting took place in the middle of that transition.

During the first stage the avenue pushed northward through field and marsh, carrying sober, solid homes behind it. The second lined it with a host of examples of what an emergent class of Americans commanded with its new wealth. In the third era the great houses, hotels, churches, and clubs whose Veblenian style and scale blared out the power and riches of nineteenth-century individuals were remade into works of commerce, shops for the carriage trade, and then a new kind of house for the corporate wealth of the twentieth century.

Having recovered from severe physical damage during the American Revolution, by the early nineteenth century New York City was the thriving economic capital of the United States. It was badly in need of an enforceable system of streets to control land development. At the city's request, in 1807 the state legislature issued commissions to Gouverneur Morris, Simeon DeWitt, and John Rutherford and charged them "to lay . . . out . . . the leading streets and great avenues, of a width not less than 60 feet, and in general to lay out said streets, roads, and public squares of such ample width as they may deem sufficient to secure a free and abundant circulation of air among said streets and public squares when the same shall be built on . . ." ⁸

They worked their street plan on an east-west line across Manhattan north from the present site of Washington Square. The result of the efforts, the Commissioners' Plan of New York City of 1811, was four years in the

making (Fig. 43). During its preparation, its authors met with considerable resistance from apprehensive owners whose property lay in the surveyed area. One of them, a woman of firm views who had been selling vegetables on her place for twenty years, pelted the surveyors with artichokes and cabbages.

The resulting plan drew first breath in what was even then a traditional American atmosphere of land speculation. While the commissioners were organizing, landowners in Manhattan quite accurately believed that by platting their properties in streets and blocks they would force the shape of the plan about to be drawn. The strategy was to create a set of accomplished facts which the commissioners would be loath to change. Forced by circumstances to be practical, the commissioners ended up as much confirming an existing state of land affairs as they did planning for a future one. They finally settled on the classic American gridiron or rectangular street pattern in lieu of "circle, ovals, and stars, which certainly embellish a plan, whatever may be their effects as to convenience and utility." Their reasons were clear. "A city is to be composed principally of



the habitations of man, and that strait sided, and right angled houses are the most cheap to build, and the most convenient to live in.”⁹

Fifth Avenue, then only a line on a map, was among the dozen hundred-foot-wide streets on the plan. It ran as far north as One hundred fifty-fifth Street. The commissioners realized that they might have caused “merri-ment” over the fact that they had “provided space for a greater population than is collected at any spot on this side of China.”¹⁰

Although they had allowed amply for the city’s northward growth, for thirteen years Fifth Avenue remained but a mark on the plan. It opened officially in 1824, starting northward from a potter’s field and public execution ground. Two years later the area was dedicated to the memory of General Washington and given over to military parades (Fig. 44). Beginning about 1827 and for several years following, a group of merchants built “The Row” on the north side of Washington Square, a line of stone-trimmed brick residences in the popular Greek Revival style.¹¹ The first structures to straddle the south end of Fifth Avenue were well-bred domiciles for a group of prosperous businessmen who were gathering their



43. The Commissioners' Plan of 1811. ENO COLLECTION, NEW YORK PUBLIC LIBRARY.

wealth from the counting houses, shops, and docks of lower Manhattan where virtually all of the city's commercial life was concentrated.

Having gone through four stages of street construction, by 1838 Fifth Avenue had been open to Nineteenth Street, although it was not for decades that grading and paving were, if never permanent, at least nervously in place. Between 1830 and 1840, lower Fifth had become the seat of New York's social leaders. Their settlement was hastened by the devastating fire of 1835 which laid waste two great areas of the old Dutch town in lower Manhattan. Some of the town's most prominent families had lived there for generations.

During the 1840's the city pushed on to a population of four hundred thousand. A guidebook marked its inhabited northern limits with a line running through Fifth Avenue at Twenty-ninth Street. Its eastern edge ran along an arc of Brooklyn streets no more than fifteen blocks deep. Despite the arrival of the city's social leaders there, Fifth Avenue was not on its list of principal streets.¹² During this period the noted diarist George Templeton Strong observed that all of Fifth Avenue to Twentieth Street was quite solidly bordered by homes and an "ambitious little row of houses" ¹³ had started as far north as Forty-second Street. Early in the same decade the Croton Reservoir opened. Its high, ugly Egyptian walls dominated the southwest corner of Forty-second and Fifth until 1900 when they gave way to the New York Public Library.

Strong deplored the lack of "reason and measure" ¹⁴ which drove the city northward. Now, by mid-century, claims were abroad that Fifth Avenue was as deserving of the visitors' interest as Broadway. By 1853, the avenue was "the most magnificent street on this continent." ¹⁵ As the muddy street planks disappeared hyperbole arrived. Such polish as the avenue enjoyed was still unpretentiously residential at the southern end (Fig. 45). As it reached north into the forties it was still principally rural (Fig. 46). Yet the change from a paper street to a substantial thoroughfare had come in little more than a generation. The trees on Washington Square were not yet fully grown. None of New York's thirty-three banks had offices on the avenue, nor was there a single Fifth Avenue address on the city's extensive list of hotels, taverns, and coffeehouses. These abounded at the lower end of Manhattan. Delmonico's, which was to gratify the tastes of coming generations of wealthy New Yorkers at various Fifth Avenue locations, still maintained its two places at the south end of the island.¹⁶



44. Washington Square, 1851, National Guard Seventh Regiment. Painting by Major Otto Boetticher. View from the northwest corner of the square shows the University of the City of New York and the Reformed Dutch Church. EDWARD W. C. ARNOLD COLLECTION. LENT BY THE METROPOLITAN MUSEUM OF ART. PHOTO, COURTESY MUSEUM OF THE CITY OF NEW YORK.

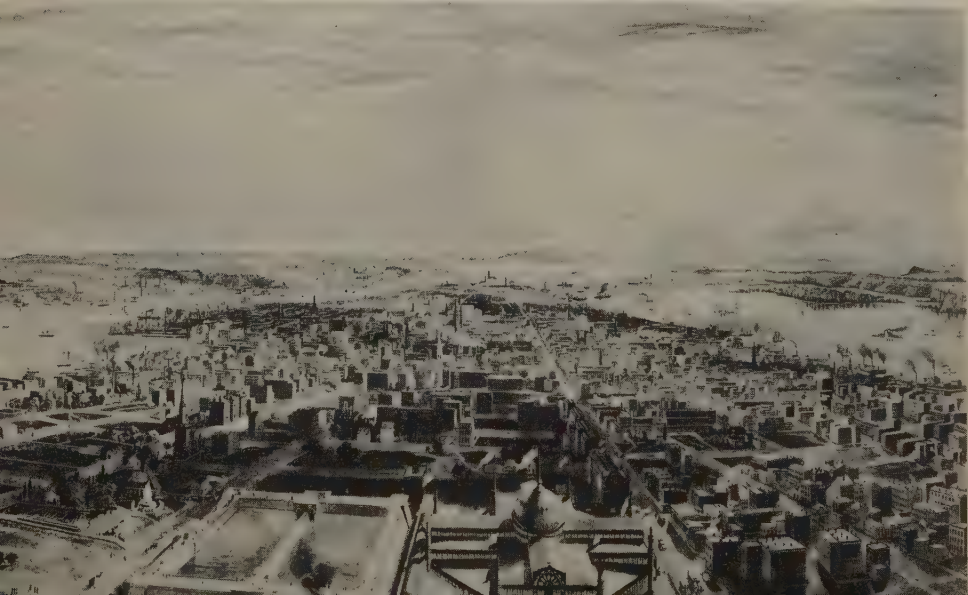
Madison Square opened officially in 1847. Its development set a much grander stage for the second era. For about three decades—the early fifties to the late seventies—the square was the social fulcrum on which the lever of Fifth Avenue swung. It occupies a place which is one-third of the way up the avenue to Central Park, and considerably more than halfway (in time) to the demand for zoning.

When the commissioners laid the grid upon Manhattan in 1811, Broadway's northwest course remained a maverick diagonal across the face of the plan. As it eventually ran toward the Hudson River it nicked the southwest corner of Madison Square. Between Twenty-second and Twenty-third Streets lies a triangle the west side of which is Fifth Avenue and the east side Broadway. For this triangle the Chicago architect Daniel Burnham



45. Bird's-eye view looking south from Union Square, 1849. On the right is tree-lined Fifth Avenue, running north from Washington Square. ENO COLLECTION, NEW YORK PUBLIC LIBRARY.

46. New York looking south from Forty-second Street, 1854. The Crystal Palace is in the foreground. OTIS ELEVATOR CO.



designed the Fuller Building which was completed in 1902 (Fig. 47). The public immediately renamed it the new Flatiron Building because of its suggestive shape. It was here at the turn of the century that Stieglitz and Steichen stood magnetized by the vision of a new world coming. Even by that late date, a nostalgia for the glories of Madison Square hung heavily on the place.

The square opened during Polk's presidency at a time when only six secretaries composed the entire cabinet of the federal government. Even as it was preparing to unfold the petals of the most dazzling flower of the Gilded Age, farsighted men understood that it was simply an impermanent halt along Fifth Avenue's northerly course. In 1850, Archbishop Hughes, Roman Catholic bishop of New York, disclosed plans for building a cathedral beyond the northern edge of the city. In another eight years, the cornerstone of St. Patrick's Cathedral was laid nearly thirty blocks above the square.¹⁷

As the development pushed northward, it opened new sections of the avenue and new visions beyond. But Henry Philip Tappan, chancellor of the University of Michigan, was as much concerned with the churning of its wake as he was with the glowing horizon. In 1855 he spoke to the New York Geographical Society about the rise of a great American urban tradition, city and street as ephemera. "The city has not only advanced in magnitude, it has also been rebuilt. The palaces of the last generation were forsaken and turned into boarding-houses, then pulled down and replaced by warehouses. He who erects his magnificent palace on Fifth Avenue to-day, has only fitted out a future boarding-house, and probably occupied the site of a future warehouse."¹⁸

Added to the hastening physical changes were other features which Anthony Trollope discovered during a visit in the early 1880's. He found two faults with New York. There was nothing to see and no way to see it since there were no cabs to be had. Yet it was an interesting city for him: "infinitely more American than Boston, Chicago, or Washington . . . Free institutions, general education, and, the ascendancy of dollars are the words written on every paving-stone along Fifth Avenue, down Broadway, and up Wall Street. Every man can vote, and values the privilege. Every man can read and uses the privilege. Every man worships the dollar, and is down before his shrine from morning to night . . ." ¹⁹

Differences about the length of Madison Square's dominance over the



47. The Flatiron Building, 1903. LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.

New York scene are marginal. Some accounts conclude it around 1880, others closer to the end of the century. The abundant reports coincide in giving it a great role in Fifth Avenue's development. It was for many years "the center of New York's brilliance."²⁰ The new Fifth Avenue Hotel was "the centre of civilization . . ."²¹ The square drew to its immediate neighborhood the trappings of elegance, the mansions of some of the wealthiest men in the nation, and created the myth of Fifth Avenue from which twentieth-century men took strength in their demand for zoning.

In its early glory Madison Square served as a promenade for the restrained display of wealth and social status. The neat rows of stooped, Italianate brownstone homes along Fifth Avenue held a steady four-story roof line. They spoke of position in very sober terms. An 1857 view down Fifth Avenue, ten blocks north of the square, reveals a scene that is solid domesticity (Fig. 48). Only an occasional church spire breaks the long

48. View south on Fifth Avenue past the spire of the Brick Presbyterian Church, 1857. HARPER'S WEEKLY.



view south to the Battery and the bay beyond. From these homes the substantial citizens came to stroll in an ante-bellum setting whose elegance was enhanced by carriage styles. Out in the country, where most of America still lived, the burden of the horse was the plow and buggy. Around the square it was brougham and hansom. The copied tone of aristocratic London squares was deliberate and appreciated.

During the Civil War, the city was torn by the memorable draft riots of 1863. A mob burned the Colored Orphan Asylum. It stood on the west side of Fifth Avenue between Forty-third and Forty-fourth Streets on a site presently occupied by the Manufacturers Hanover Trust Company Building done by Skidmore, Owings and Merrill, a modern testament to the magnitude of change on the avenue.

The square shifted character following the Civil War. Staid domesticity gave way to bustling, fun-loving commerce. The dignified promenade turned into a romping ostentation of new wealth. As Chancellor Tappan had prophesied, along lower Fifth Avenue what had once been the serious homes of the city's prominent were now being converted into boarding houses.²²

Then the hotels began to arrive. Despite their growing number of important permanent occupants, their lavish parlors and gracious settings, places like the Albemarle Hotel and the Fifth Avenue were places of business. The traffic breeding, the street-floor shops, and the basically commercial nature of the activity drew no criticism. On the contrary, it earned affection tinged with lower-class awe. The hotels on the square would be remembered lovingly for feeding well, for prodigal appointments, and for the proud line of notable guests who slept, played, and plotted there. It was in one of these that Robert Grier Cooke chose to gather his successful business friends together as late as 1907.

The Fifth Avenue was among several hotels on or near the square whose fame went before them to the century's close (Fig. 49). Hoffman House, also on the west side of the square, boasted a famous bar whose lush Bouguereau canvas, *Nymphs and Satyr*, was a fixture of the social scene. Hoffman House was the kind of watering hole for New York's Democrats that the Fifth Avenue was for Republicans.²³ By 1875 on the north side of the square the Brunswick had become a haven for gourmet and horseman. Its very wealthy and socially distinguished Coaching Club held famous spring and autumn four-horse drives which the city came to watch.



49. Madison Square, 1908. Water color by K. de Ceglic. Twenty-fourth Street looking north from the corner of Fifth. Fifth Avenue Hotel at left. Madison Square Garden at right through trees. Note advertisements on the buildings. ENO COLLECTION, NEW YORK PUBLIC LIBRARY.

Across the street in 1876 Delmonico's came north from Fourteenth and Fifth where it had opened a place during the late sixties.

The post-Civil War transformation of Madison Square began the era during which Fifth Avenue changed from a street of modest homes into a major monument of American civilization. Edith Wharton called it "the coming of the new millionaires,"²⁴ the period covering the late years of the nineteenth century in which the barons moved north of Madison Square, bearing their trains of mansions, churches, clubs, and hotels up Fifth Avenue.

Nothing happened out of a design for the avenue, either grand or mean. Neither the city government nor the private populace had laid concerted plans for the street. In the great tradition of the American city, the avenue simply grew by the process of unplanned attraction. One life-style drew similar life-styles, until the place took on some kind of social and functional consistency. The wealthy concentrated there, their mansions concentrated there.

The free-standing mansion broke what had been the steady pattern of attached Fifth Avenue brownstones. During the sixties the most prominent example of this new development was Alexander T. Stewart's mansarded

white marble palace on the northwest corner of Thirty-fourth and Fifth (Fig. 50). Stewart was a dry-goods king and prominent landowner. In *The Architecture of America*, Burchard and Bush-Brown described his mansion as “lavish, comfortable, a flagrant display of wealth, and clearly an emulation of European traditions of imperial, not even domestic, architecture.”²⁵ It is also a summary of much of the residential building which was to move up Fifth Avenue during the coming decades.

The same authors also have an important word to say about the focus of the American architect as the nineteenth century concluded. “The kind of life Caroline Schermerhorn Astor saw from her windows in the mansion at Fifth Avenue and Sixty-fifth Street revealed no sense of what reporters like the Danish Jacob Riis were discovering in the Bowery’s Tenth Ward where people were packed 522 to the acre by 1890 . . . Few architects seem to have been much interested in such problems.”²⁶

The architect’s distaste for facing such social squalor was not peculiar to his profession. The late nineteenth century was marked by the separation

50. A. T. Stewart’s two-million-dollar marble palace, built in 1869, at the northwest corner of Fifth Avenue and Thirty-fourth Street (c. 1894). MUSEUM OF THE CITY OF NEW YORK.



of other professionals, like the minister, the lawyer, and the professor, from the nastiness of affairs. The partial closing of this gap was part of the coming reform movement.²⁷

With the new century still in its infancy, the new rich staked out thirty blocks of Fifth Avenue along the east side of Central Park from Sixtieth into the early Nineties. As they were being tamed and given a European grooming, they deposited the greatest concentration of private structures in the history of the nation, "Millionaire's Row" (Fig. 51). Hardly a half-century earlier the Washington Square homes of New York's wealthiest had simply been called "The Row."

The vast phalanx of marble, brick, and limestone was the architectural culmination of what social Darwinism had done for the evolution of the log cabin and the sod hut. "Millionaire's Row" generated awe and derision, contemporary and latter day. Critics asserted that it was architectural craftsmanship of the highest order or the utter denial of native building growing in native soil. In another half-century most of it would become luxury skyscraper apartments, landmarks of change in New York's style of domestic life and tombstones where architectural historians would weep.

"Millionaire's Row" was an essay in private property and power. Appropriately enough, the southern bastion was the colonnaded Metropolitan ("Millionaire's") Club at Sixtieth Street. Erected between 1892 and 1894, it was designed in Italian Renaissance Eclectic²⁸ by the firm of McKim, Mead & White for a site formerly owned by the Duchess of Marlborough. The money came from a variety of sources, the inspiration for its founding from J. P. Morgan. He organized it after a partner was refused admission to the Union Club. At Sixty-fifth Street Richard Morris Hunt did a mansarded monument for Mrs. John Jacob Astor (furs and land). Beginning in the late 1890's, she bathed there in a two-ton bathtub cut from a solid block of marble.²⁹

Proceeding into the Seventies (Fig. 52) Hale and Rogers restated Italian Renaissance Eclectic³⁰ for the 1907 mansion of Edward S. Harkness (oil). At Seventy-eighth Street the Duke (tobacco) mansion was completed in 1912. Horace Trombauer designed it in French Classic Eclectic (Louis XV). Its model was the late eighteenth-century Hôtel Labottière in Bordeaux.³¹ Several years earlier Isaac Vail Brokaw (clothing) had been moved to reside at Seventy-ninth Street in an adaptation of the Château of Chenonceaux on the River Cher in France. Rose and Stone were the



51. "Millionaire's Row," 1898. Fifth Avenue north from Sixty-fifth Street. The foreground chateau was designed by Richard Morris Hunt for Mrs. John Jacob Astor, who removed there from her smaller mansion at Thirty-fourth and Fifth. BYRON COLLECTION, MUSEUM OF THE CITY OF NEW YORK.

52. Fifth Avenue north from Seventy-fourth Street, 1901. BYRON COLLECTION, MUSEUM OF THE CITY OF NEW YORK.



architects, the official style French Renaissance Eclectic.³²

In the Eighties a Louis XIII château gave Carrère & Hastings the basis for their design for William Starr Miller (heir).³³ And in the Nineties stood a statement of the English tradition, the modified Georgian Eclectic mansion of Andrew Carnegie (steel) the work of Babb, Cook and Willard done between 1899 and 1903 (Fig. 53).³⁴ At the turn of the century the site had been occupied by another American statement, shanties (Fig. 54). Even America was finally represented in Delano and Aldrich's Federal Eclectic mansion for Willard Straight (banking) done between 1913 and 1915 at Ninety-fourth Street.³⁵

The places in between were laid on with the same spirit and substance. Cheek by jowl and oriel by mansard arose visions of the valley of the Loire, the English countryside, and the hill towns of Italy. If there was a native prospect, it was expressed not only as Federal Eclectic but, perversely enough, as Vanderbilt Château. These were copies of a copy Richard Morris Hunt did for William Kissam Vanderbilt.

The gray limestone Vanderbilt house—the original copy—at the northwest corner of Fifty-second and Fifth (1879–1881) was the structural pinnacle of a range of impressive peaks stretching further north up “Millionaire's Row.” Everything about it was at a maximum scale intended for a maximum result. Its owner was among the wealthiest men in the city. His wife was among its most socially ambitious residents. Hunt was the epitome of the architect for the rich.³⁶ His design for the castle occupies an important place in American architectural history.³⁷

William Kissam Vanderbilt was the Commodore's grandson. William Kissam's father, William Henry Vanderbilt, had a less celebrated triple house built for himself and his daughters at about the same time (1880–1884) in the next block to the south. It was designed by Christian Herter of Herter Brothers, New York's leading post-Civil War decorators (Fig. 55).

Although less heralded than the Richard Morris Hunt classic, it was not quite a restrained exercise either. To maintain the Italian Renaissance spirit, William Henry Vanderbilt had the Ghiberti gates cast in bronze from the originals in Florence, overlaid them in gold, and hung them in the southern wall of the vestibule. For a year and a half six hundred to seven hundred men worked at the interior decorations. Two hundred and fifty carved wood. Sixty stone workers were brought from abroad to sculpt and chip away for two years and then return to their homeland.³⁸



53. Andrew Carnegie residence, c. 1905. Fifth Avenue and Nineteenth to Ninety-first Street (view looking west on Ninety-first Street). BYRON COLLECTION, MUSEUM OF THE CITY OF NEW YORK.

To mark the event, the owner commissioned an ornate four-volume folio, *Mr. Vanderbilt's House and Collection*. It began by promising to reveal "a private home which, better than any other possible selection, may stand as a representative of the new impulse now felt in the national life. Like a more perfect Pompeii, the work will be the vision and the image of a typical American residence . . . It is as sincere a home as exists anywhere." ³⁹

Cornelius, another son of the Commodore, had a place at Fifty-seventh Street. Between his and William Henry's triple mansion was grandson William Kissam's château at Fifty-second. Rising in the midst of this Vanderbilt domain was Dr. John Hall's church at Fifty-fifth (Fig. 56). In 1887 an English visitor described it as "the largest and wealthiest Presbyterian Church in the world. Its pastor is said to preach to £50,000,000 every Sunday." ⁴⁰

William Kissam Vanderbilt's great château at Fifty-second and Fifth was a residence, a boast to the passing world, and a wedge to open the doors of New York society for his wife. For two generations, her husband's forebears had pounded upon those doors in vain. The Commodore's rough



54. Fifth Avenue and Ninety-first Street, c. 1898. Replaced by the Carnegie mansion. MUSEUM OF THE CITY OF NEW YORK.

style barred him. Despite his son William Henry's inheritance of ninety millions he could not get in either. William Henry's second son, William Kissam, was married to a singularly dedicated woman who used a house and a street to achieve what had been denied previous underprivileged generations of the family.

In Fifth Avenue's case, such uses of a building and a street were a distinct part of the annals of growth and change. Out of them came a stream of legendary avenue life which flowed into the early twentieth century, and, in one case, contributed concretely to important physical change on the street.

In the block south of A. T. Stewart's marble palace at Thirty-fourth and Fifth stood the mansion of the unquestioned queen and arbiter of New York society, (The) Mrs. William B. Astor. It was she who determined Mrs. William Kissam Vanderbilt's social acceptability. Her sister-in-law, Mrs. John Jacob Astor, III occupied the adjacent mansion. Both Astor mansions were built in 1859, the year the Fifth Avenue Hotel opened.

Following a long and incredibly dull intramural contest over whether his wife or his aunt, Mrs. John Jacob Astor, III, would be The Mrs. Astor,

William Waldorf Astor ragefully abandoned the struggle, hurled a judgment that “America is not a fit place for a gentleman to live,” and repaired permanently to England where he took citizenship and eventually a viscounty.⁴¹ Wishing to leave his socially competitive aunt a suitable expression of his regard for her, he committed vendetta by skyscraper, violating her mansion by demolishing his and building the Waldorf Hotel on its site (Fig. 57).⁴²

55. The west side of Fifth Avenue north from Fifty-first Street, c. 1892. The triple mansion of William Henry Vanderbilt and his two daughters. In the next block is the William Kissam Vanderbilt château. St. Thomas’s Church is at right edge of photograph. BYRON COLLECTION, MUSEUM OF THE CITY OF NEW YORK.





56. The west side of Fifth Avenue north from Fifty-fifth Street, showing the Fifth Avenue Presbyterian Church. BYRON COLLECTION, MUSEUM OF THE CITY OF NEW YORK.



57. The original Waldorf Hotel at Thirty-third Street and Fifth Avenue, 1893, prior to the erection of the Astoria in 1897. In right foreground, the southwest corner of Thirty-fourth and Fifth, is the mansion of Mrs. John Jacob Astor III. WALDORF-ASTORIA.

The Waldorf opened in 1896. Her nephew's new building threw the other Mrs. Astor's place into the shadows and into the hurly-burly which an important commercial facility generates. The steel-frame technique had armed Astor with a weapon of vengeance as well as a tool of urban growth and, in a negative way, so had the absence of land and building controls. Fifth Avenue enjoyed no more immunity as a street than did any of its palaces. The Waldorf eventually twinned with the Astoria, which went up on Mrs. Astor's lot when she retreated up to "Millionaire's Row" (Fig. 58). Shortly after, the old Stewart mansion, now a club, was leveled and replaced by Stanford White's creamy classic, the Knickerbocker Trust Com-



58. Fifth Avenue looking south from Thirty-fifth Street, c. 1897. The A. T. Stewart mansion is at the northwest corner of Thirty-fourth Street; the original Waldorf-Astoria, at Thirty-third to Thirty-fourth. MUSEUM OF THE CITY OF NEW YORK.

pany Building (Fig. 59). The enlarged hotel added another increment to the growing turbulence on the avenue.

What had been the elegant Madison Square-Murray Hill section was crumbling under the commercializing push of the grand hotels coming northward. Even as the avenue above Fiftieth Street was forming into a new region of great private residences, the tall luxury hotels were not far behind. Between 1901 and 1907, within the area of Fifty-fifth to Fifty-eighth Streets, three of them were built, the St. Regis, the Gotham, and the Plaza. The effect of Central Park's masterful design by Calvert Vaux and Frederick Law Olmsted was that of a splendidly ornate carpet laid before



59. Knickerbocker Trust Co. at right, Waldorf-Astoria in the background, 1904.
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the Plaza and "Millionaire's Row" (Fig. 60). Two generations before, as the execution of the design was about to begin, the site of the Plaza at Fifty-seventh and Fifth was the east end of a seedy strip of shanties (Fig. 61). The great hotels did indeed catch the spirit of European eclecticism (Beaux Arts and French Renaissance), and the free-standing mansion scale was smashed less than two generations after the mansion began to break up the steady rows of brownstones.

It was not so much pure accident as again the process of unplanned attraction that set the nearly identical timing of the Astor incident and the building of "Millionaire's Row." Developmentally, the Row was like a containing force whose southern end at the corner of Central Park marked the point at which the line was drawn. North of it lay the untouchable preserve of wealth. That too would turn out to be a less than permanent arrangement.

Any attempt to define the end of an era must be arbitrary. But if it cannot be concluded definitely, one can at least place markers which point in that direction. Ward McAllister's cortège down Fifth Avenue in 1895 is a reasonable point at which to begin the windup of the second stage of Fifth Avenue's growth. The photograph of the procession of Mrs. Astor's social counselor and chamberlain, whose cultural contribution was the term "The 400" and the fatuous *Society As I Have Found It*, is a glimpse of high society's homes about to disappear from the middle stretch of the avenue. Save for the spire of the Brick Presbyterian Church, the modest roof line and the brownstone stoops still hold. A. T. Stewart's mansion has now become the Manhattan Club, but the theme remains distinctively residential (Fig. 62). That theme, about to be violated, had now been maintained since Stewart put up his palace. Views looking up the avenue, even to the end of the century, disclose the nearly steady horizontal growth of the brownstone house (Figs. 63-65) but virtually no vertical change save north of Forty-second Street where the line began to waver (Figs. 66, 67).

Nearly twenty years later, Theodore Dreiser looked back upon this transitional period, recalling "the splendor of the purely social Fifth Avenue of the last decade of the last century and the first decade of this . . . as opposed to the purely commercial area that now bears that name."⁴³ Willa Cather remembered Madison Square "at the parting of the ways."⁴⁴

The bridge across the second and third eras of the avenue was a span between a residential street and a street of business. Madison Square stood





62. Ward McAllister's funeral, 1895. View looking north from Thirty-fourth Street. The Stewart mansion (then the Manhattan Club) is on the left. BYRON COLLECTION, MUSEUM OF THE CITY OF NEW YORK.

60. (*top, facing page*) Central Park, 1903. The Plaza Hotel in center background. LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.

61. (*bottom, facing page*) Skating in Central Park, 1859, showing Fifty-ninth Street from Fifth to Seventh Avenue. The shanties and homes in the background are on the south side of the park. MUSEUM OF THE CITY OF NEW YORK.



63. Fifth Avenue, 1898, four years after the death of Mme. Restell, a notorious abortionist and black-mailer who lived at the northeast corner of Fifty-second and Fifth. Photo-lithograph from *Puck* (German edition). BYRON COLLECTION, MUSEUM OF THE CITY OF NEW YORK.



64. Looking north from Thirty-seventh Street and Fifth Avenue, 1898, showing the Brick Presbyterian Church. BYRON COLLECTION, MUSEUM OF THE CITY OF NEW YORK.

ten blocks south of the point at which the photograph of McAllister's funeral was taken. Most of its earlier rich gloss of domesticated wealth was gone now. In 1890 Madison Square Garden opened on its northeast corner (Fig. 68). The site had been purchased from the Vanderbilts with funds contributed by Morgan and Carnegie.

65. Fifth Avenue, 1905. The Union League Club at the northeast corner of Fifth Avenue and Thirty-ninth Street. BYRON COLLECTION, MUSEUM OF THE CITY OF NEW YORK.





66. The Easter Parade on Fifth Avenue looking north from Forty-first Street, 1897. The Egyptian walls of the Croton Reservoir (now the site of the New York Public Library) on the left. BYRON COLLECTION, MUSEUM OF THE CITY OF NEW YORK.

Stanford White (whom Harry K. Thaw murdered on the roof garden in 1906) designed the building after the Giralda in Seville. The city loved Saint-Gaudens' Diana poised on tiptoes on the tower. Illustrative of the Garden's aura of fun and games was the turn-of-the-century anecdote that Diana had climbed there to flee White's advances.⁴⁵ The tower "expressed perfectly the mood the Garden was intended to evoke, the mood demanding music, dancing, parades of wooden soldiers, banners and the sound of horses hoofs."⁴⁶ It was touted as the "'most magnificent amusement palace in the world,' larger even than London's Agricultural Hall."⁴⁷

What was meant to be a self-replenishing goulash of theater, restaurant,



67. The east side of Fifth Avenue looking north from below Forty-fourth Street, 1898. Delmonico's at the northeast corner. The twin spires of St. Patrick's cathedral in the left background. BYRON COLLECTION, MUSEUM OF THE CITY OF NEW YORK.

horse show, and carnival on the square was a failure. It was a pronounced shift away from the area's earlier character. Into this increasingly gaudy ambience in the square and the mid-stretch of the avenue came massive doses of other forms of commerce, not nearly as sporting but somewhat more successful. Whereas late in the century there had been only an occasional and discreetly placed art gallery, boutique, or elite butcher shop, by the beginning of the century the big stores had started to arrive.

New York became a great city in the nineteenth century. Its location was extraordinarily favored for the conduct of domestic and foreign trade. On a much smaller scale, the factor of location was just as critical to the



68. Madison Square Garden, c. 1895. Water color by Louis Sonntag, Jr. BYRON COLLECTION, MUSEUM OF THE CITY OF NEW YORK.

success of the city's shops. But they enjoyed, and to survive had to exercise, a mobility which is denied a city. A Tiffany's moves with the trade. A New York City stays where it is put.

The retail shopkeepers moved out of the old Dutch city in search of their northward-migrating customers. The New York department store, a Parisian invention, developed into a well-organized institution. No one in Manhattan contributed more to its success than A. T. Stewart, whose antebellum six-story "marble palace" of commerce at Broadway and Chambers Street funded his residential palace at Thirty-fourth and Fifth. An English visitor in 1864 judged Stewart to be "next to the President, the best known man in America. For 'dry-goods' are a surer road to fame than politics and legislation."⁴⁸ Stewart followed the northern route. In 1862 he put down his next dry-goods palace on Broadway near Astor Place. In the 1880's Manhattan had its next well-developed shopping area for the carriage trade in the vicinity of Fourteenth Street, Broadway, and Sixth Avenue. Stewart's was near by, and Lord and Taylor, Arnold Constable and Company, and W. & J. Sloane were also located there.

By 1896 "The Shopper's Paradise" had moved northward again on a Sixth Avenue reach to Twenty-third Street. Crossing into the new century, the great retail establishment turned east to Fifth and then pushed northward. What it did to Fifth Avenue was a tiny-scaled version of what the coming Great War was to do to America. Each ended something of a golden age, one for a street and the other for a nation, but the memories in both cases remained profound.

As the rhetoric of change on early twentieth-century Fifth Avenue took form, its overriding tone was martial. It presaged what soon would become an international language—invasions, battles, wars, ruthlessness. Through more than half a century it has remained an important part of American zoning's rhetoric.

Some forty years after "the invasion of trade" had begun, the Federal Writers' Project, which produced the excellent *New York City Guide*, observed that it "aroused such opposition that echoes of protest are still audible."⁴⁹ Henry Collins Brown, founder of the Museum of the City of New York, suggested that the onslaught began when Franklin Simon, a woman's specialty shop, fired "the first shot from the enemy's camp . . ." It went off at Thirty-eighth and Fifth. "A general assault all along the line followed and one stronghold after another capitulated. Rockefeller, Van-

derbilt and others spent millions in a vain attempt to head off the onrushing but in the end were defeated.”⁵⁰

The palatial walls of Fifth Avenue came tumbling down under the impact of land economics as well as the demolition sledge. The earlier domestic development of the avenue brought rising values as it became more fashionable for the rich to live there. The process spiraled. Rising demands for status sites on the avenue ran up the price of the limited commodity.

The arrival of the large stores below Central Park greatly intensified the price rise. Land used for such purposes as department stores and hotels commanded much higher prices than land used for the most elaborate residential purposes. The prices of Fifth Avenue land rode on the tides of boom and bust. The Fifth Avenue experience enriched the great tradition of swift killings in land speculation. In 1901, for example, George C. Boldt of the Waldorf paid \$1.2 million for the southeast corner of Thirty-seventh Street and Fifth Avenue. Two years later he sold it to Tiffany and Company for \$2 million.⁵¹

In 1906 B. Altman and Company opened at the northeast corner of Thirty-fourth and Fifth. A. T. Stewart and the Astors had earlier lived on opposite corners of the intersection. To blunt the residents' opposition to what is still one of Manhattan's largest department stores, Altman's put a stone Florentine *palazzo* façade on the Fifth Avenue side. The Madison Avenue wall, which did not face the same kind of opposition, got prosaic brick. To mute the activity within, for many years the building lacked any sign of its owner's name or purpose. Only the shop windows gave hint.

Altman's arrival was not the panic point. Nor was any other specific event. The transition did not occur overnight. When Altman's opened, only one of the city's forty-two national banks had a Fifth Avenue address, and that was at Twenty-third Street, by then a declining area. Only one of its twenty-nine savings banks was on the avenue.⁵² The great upheaval took the vague but accumulating outline of many lesser ones: DePinna in 1895; Franklin Simon in 1902; the Gorham Building in 1905; and comparable arrivals of large, fashionable shops (Fig. 69).

But however imperceptible it may have been from day to day, the third great transformation was under way. Robert Grier Cooke called his meeting in 1907 to protect and defend its special direction.

When Cooke's group met at the Fifth Avenue Hotel they turned to deal with one important question. Who is master of a city's street? The busi-



69. From the Flatiron Building looking north up Broadway and Fifth, 1911.
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nessmen there were part of a buildup of power which had begun to provide a pretty clear answer. It could be read in the departure of the baronial residents. He is master who can take ground, take leadership, and create and exercise as much appropriate force as the situation demands. So long as government has no role in answering the question, only he survives who is fit to survive and fitness is measured by power and nothing else.

In the development of American zoning the conduct of the Fifth Avenue Association and of the avenue's retail merchants was an urban episode in

creating and applying private power to private ends. It was cut whole from the culture of its times—Spencerian in its blunt use of strength, immensely optimistic in what it promised to create, and charged with brazen energy. It carried big anomalies too—like manipulating power in unbridled style, then putting the harness of law upon it; *laissez faire* one day, public planning the next. But however small the scale, however harsh the words and deeds, it was all done in the name of progress.

Invasion by trade was an inexact metaphor, since it did not adequately suggest the whole Fifth Avenue situation early in the century. The Cooke group had not met to concert further attacks to the north. That was to remain a venture of the individual retail merchant. In fact, Cooke had rallied his business friends to turn back the rising attacks from the south. What was coming up the avenue in hot pursuit was the garment industry. It sought the same thing as the carriage trade merchant—gain—but its route was lower Fifth Avenue, its great weapon was the tall loft building, its generals were real estate speculators, and its troops were lower East Side immigrants.

If this was war of sorts, it was in truth a double war: garment manufacturers fighting retail merchants fighting wealthy residents. The entire conflict was much closer in spirit to social Darwinism than to the Geneva Convention. There were no rules and only one objective, survival by any means.

The rise of the garment industry and its threat to the retail merchant was a swift-moving and in some respects archetypal event of nineteenth- and early twentieth-century culture. Like the steel-frame building the industry was a creature of an industrial innovation, the sewing machine. This 1846 invention revolutionized methods of clothing manufacture and brought a rapid increase in ready-made apparel. In a parallel development, the custom clothing trade abandoned its exclusive use of the skilled tailor. The tailor began to take some of his work home, giving simple portions of it to his wife and daughters. Eventually most unskilled work came into the hands of women who sewed in their homes.

The use of such unskilled labor created differences in grades of clothing, depending upon where the manufacturing was done. The best grade was made in the master tailor's shop. A second grade came from the tailor's home, where he divided the work among his family. A third grade was contractor's work. The contractor did it either in his own shop or farmed it



70. Calling for work to be done at home. PHOTO. BY LEWIS W. HINE. GEORGE EASTMAN HOUSE COLLECTION.

out to home workers. The second and third methods came to dominate the industry.⁵³

An important part of the fabric of both New York life and New York zoning was made by the contractor who drummed up work from clothing houses and the turn-of-the-century immigrant who did it.

The sweatshop was invented on the lower East Side out of hours seemingly without end, wages seemingly without beginning, wretched environmental conditions, and a flood tide of cheap immigrant labor. By the mid-1880's the immigrants pouring into New York from southern and eastern Europe were adding new dimensions to the city's culture and to its housing problems.

The operator of the sweatshop ("the sweater") was a middleman who, with a couple of sewing machines hired on credit, took subcontracted work from the clothing houses and put out the bulk of it to tenement house labor (Figs. 70, 71). Late in the nineteenth century such work was still beyond the reach of factory laws. In *How the Other Half Lives*, Jacob Riis wrote (1890) that in the tenement "the child works unchallenged from the day he is old enough to pull a thread."⁵⁴

Early in the new century the system of "putting-out" had shifted from the tenement to the large shop. By 1903 70 per cent of New York's coat production was done in factories. There the manufacturer would hire a competent machine operator, assign factory machines to him, and the operator would in turn hire young women such as those who died in the disastrous Triangle Fire of 1911. The manufacturer dealt only with the contractor. The contractor paid the girls. These arrangements led to intensively competitive contractor bidding, great wage pressures, many small shops, and short-lived operations. But despite its huge social costs and wild economic fluctuations, the New York clothing industry grew remarkably.

Between 1899 and 1914, the number of New York wage earners in the men's clothing industry rose from about thirty thousand to close to fifty thousand, more than a quarter of the entire national industry. In the same period, New York production accounted for more than one-third of the national value of men's clothing. By 1914 its annual value was in excess of \$160 million.⁵⁵

The women's garment industry was much larger in all respects. In 1914 New York was producing over 70 per cent of the national value of the product, or about \$340 million.⁵⁶ Between 1900 and 1912 the New York

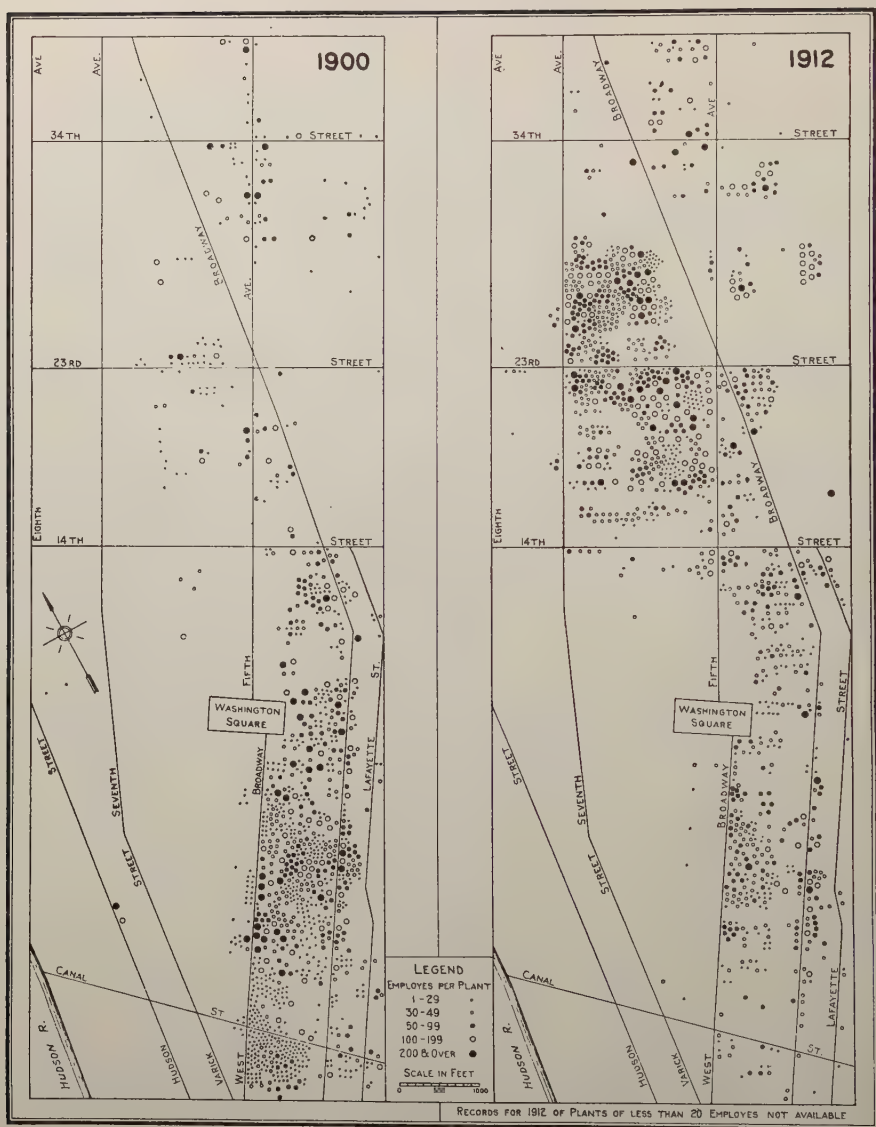
industry nearly doubled its worker population to about 137,000 wage earners.⁵⁷

This marked early twentieth-century growth occurred as the industry, especially women's garments, was turning into and up Fifth Avenue.

In 1900 over three-quarters of the men's clothing plants were in Man-

71. Sweatshop in a Ludlow Street tenement, c. 1889. "Knee pants" at forty-five cents a dozen. PHOTO. BY JACOB A. RIIS. JACOB A. RIIS COLLECTION, MUSEUM OF THE CITY OF NEW YORK.





72. Location of plants in the women's garment industry in the area of greatest concentration in Manhattan, 1900 and 1912. REGIONAL PLAN ASSN., INC.

hattan below Fourteenth Street, with the heaviest concentration southeast of Washington Square and in the lower East Side. Few were in the Fifth Avenue area, and that situation did not change remarkably during the coming two decades.⁵⁸

The women's garment industry, a general term for what was in fact a number of specialized divisions, making coats, suits, dresses, and shirtwaists, presented a radically different trend of movement. By 1900 about sixty thousand garment workers were employed in plants in the area between Fourteenth and Forty-second Streets in the immediate vicinity of Fifth Avenue. By 1912 the number of workers there had nearly doubled.⁵⁹

In two-dimensional graphics, the migration of the women's garment industry presents a striking contrast between 1900 and 1912. In 1900 the concentrated mass of the industry was below the fulcrum of Washington Square on whose north side Fifth Avenue originates. Twelve years later, the seesaw had tipped down beyond the square under the northward shift of the industry. It was on both sides of Fifth Avenue from about Fourteenth to Twenty-third, with operations going on north to Thirty-fourth Street (Figs. 72a, 72b).

A third dimension comes through a retelling of the impact this migration had as it began moving up University Place on the eastern edge of Washington Square.

Just to the east lay the Ladies' Mile of Broadway, still a fashionable shopping district. A man who managed the oldest and most esteemed department store on that row has told me what happened next. One year, things were going as usual. The carriage trade parked its conveyances in University Place or along the side streets. Next year the carriage folk, shopping in the fashionable hour between twelve and one, found themselves struggling for passage with ten thousand operatives. The window-dresser could not set out a new model but a crowd of designers, sketchbook and pencil in hand, flattened their noses against the plate glass. The store fled to a Fifth Avenue site above Thirty-fourth Street.

This retreat became a rout.⁶⁰

As fragmented and chaotic as the industry seemed, it was moving with a certain overall rationality. By the turn of the century, New York had become the women's style setter for the nation. Feminine fashion is a racing, treacherous current. Endless and sudden changes run rapidly through the industry. To negotiate such hazards called for a special kind of man. He was coming in on the great flow of southeastern European immigration.

The exhaustive study of the garment industry conducted by the Regional Plan of New York during the 1920's described him thus: "In both men's and women's clothing the backbone of the industry has been the influx of immigrants from Russia and Italy. These immigrants have furnished not only the workers but the employers. Much that is chaotic in the clothing industries can be traced back to the psychological peculiarities of the predominant racial group which has provided both wage-earners and manufacturers. It seems to be true that the flexibility of the New York clothing industry represents a capitalization of the ambition of the Jewish worker and small contractor to improve his economic condition." ⁶¹

The volatility of fashion and the enormity of the national and local market put a premium on a ready supply of cheap immigrant labor, rapid delivery of materials, and convenient access to buyers. New York could meet all of these demands.

The other important factor which bred concentration was the location in New York of such related activities as jobbing, wholesaling, and converting. Port and railroad terminals furnished excellent means of concentrating raw materials.

Proximity to hotels and railroad terminals was very valuable for an industry which drew buyers from across a nation which still used the train rather than car or airplane. Since 1871, Grand Central Terminal had been located on Forty-second Street, two blocks east of Fifth. The new Pennsylvania Station opened in 1910. It stood two blocks west of Fifth at Thirty-third and Seventh Avenue.

The local transportation system too encouraged concentration in the newly developing Fifth Avenue retail area. Rapid transit lines built early in the century allowed the garment manufacturer to pursue the retailer up Fifth Avenue without breaking his cheap public transit linkage to the great supply of immigrant labor.

The steel-frame building completed the mix. It was the perfect method for assembling garment operations in the confined, strategic Fifth Avenue area. What had been a kind of late nineteenth-century cottage industry littered through the tenements of the lower East Side was now drawing together in the skyscraper lofts appearing along lower Fifth. The tall loft building, the typical vehicle for early twentieth-century garment operations, and the human beings working in them were the ultimate forces of change which led Cooke to call his meeting at the Fifth Avenue.

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Peculiar matters, then, were coming to a head early in the new century: a remarkable national temper and a unique mix of experience about to boil over in lower Manhattan and along Fifth Avenue. Zoning appeared at precisely the time that New York was making the country's most spectacular buildings and remaking one of its most exotic streets. It grew from the womb of an idea, urban planning.

Everything that American zoning became or failed to become was ultimately bound up in that relationship. Its remarkable spread throughout the nation's towns and cities, its development as an important and increasingly disturbed body of law, and the eventual variations on its central themes ran back in time and thought to the emergence early in the twentieth century of the idea of city planning.

The American idea and practice are as old as the New World. Their strands can be traced back to Greek and Roman urban planning principles and up through the influential dreams and works of Renaissance utopians and military engineers.¹ Among the most notable examples of early American town planning were William Penn's plan of 1682 for Philadelphia, Major L'Enfant's late eighteenth-century design for Washington, D.C., and the efforts in 1807–1811 of the New York commissioners. Yet, as a self-conscious movement with its own literature, urban planning did not arrive until the late nineteenth century. In addition to the major plans coming from a few growing cities, there were also smaller though important colonial efforts to systematize streets, wharves, and public markets and recreation grounds. In the mid-nineteenth century the New York State Legislature established a Central Park Commission, out of which came the

superb Vaux-Olmsted creation and a powerful late nineteenth-century movement for interrelated public parks, recreational areas, and parkways. Olmsted, who moved to Boston in 1880, had great influence both on the design of such a system for Boston and on the growth of the movement. Coupled with this was the organization of such civic associations as the National Municipal League and the American Park and Outdoor Art Association.²

For city planning in the United States, the twentieth century began prematurely and clearly in 1893. In that year a youthful University of Wisconsin history professor read a paper to his colleagues at a meeting of the American Historical Association. He titled it, "The Significance of the Frontier in American History."³ In his essay, which was to run the cycle of academic boom and bust, Frederick Jackson Turner opened with a quotation from the Superintendent of the Census for 1890: "Up to and including 1880 the country had a frontier of settlement, but at present the unsettled area has been so broken into by isolated bodies of settlement that there can hardly be said to be a frontier line. In the discussion of its extent, its westward movement, etc., it can not, therefore, any longer have a place in the census reports."⁴

Out of this dry statement of fact Turner drew what he called "the closing of a great historic movement,"⁵ the colonization of America's western lands. It was his theory that the vast areas of free land in the West, and their continuous disappearance under the advance of westward American settlement, explained the development of the nation. He said that it was a continual "beginning over again on the frontier,"⁶ a "perennial rebirth"⁷ in the westering. The seemingly endless opportunities for free land kept the colonizing American in constant touch with the simplicity of primitive frontier society.

Turner argued that the frontier was the crucible in which the American character was made. There, he said, a man became free, and out of the struggle for life along the raw edge of civilization he became a new kind of man. It was an experience which worked powerfully toward nationalizing the country by generating demands for internal improvements, tariff protection for agricultural products growing in the frontier's wake, and railroad development to serve it. The repeated movements of the frontiersman broke down sectionalism, and, most important of all, Turner believed that the frontier promoted democracy.

Along with democracy came a unique individualism. Turner suggested that the wilderness on the frontier cast its inhabitants into a primitive social organization, based not on government but on the family. The relationship bred a frontier hatred of public controls. But the individualism which Turner admired for its love of freedom also had an abusive side. He suggested that when it was involved in government it led to financial irresponsibility, and expressed itself in lax business honor and wild speculation.

The essay's final argument was that the frontier had a deep influence on the American mind, a mind Turner found to be coarse but powerfully sharp and curious, a mind masterfully equipped to deal with material things, and one which was without artistic qualities yet restless and crackling with nervous energy.

From its early great influence on historical thinking to its later disfavor the essay contributed one judgment for which time has offered nothing but steady verification. In laying stress on the disappearance of the frontier, Turner was in effect saying that the nation's future could no longer be sought there or even in its farms and villages. For better or worse, it was going to be in the American city. It was there that all the American restlessness and drive would have to find new outlets. In the three decades since the outbreak of the Civil War, the statistics were already piling up to document Turner's sense of the trend. In 1860, 25 per cent of the population of thirty-one million lived in urban areas. By 1893 the population had more than doubled and 35 per cent was in urban areas.⁸

The Industrial Revolution and immigration were contributing mightily to the growth of cities. They were also swamping them with problems of such magnitude and novelty that the cities were unable to cope with them. This led James Bryce to make what is probably the most quoted judgment in *The American Commonwealth*, his monumental study written at about the same time as the Turner essay: "There is no denying that the government of cities is the one conspicuous failure of the United States."⁹ Jane Addams' experience in Chicago confirmed it. There she found a sea of immigrants so vast and ignorant of the civic duties of the American that "the idea underlying our self-government breaks down . . ." ¹⁰

Turner delivered his paper in a setting whose influence turned out to be more durable than his reflections on the origin of American character. In 1893 the American Historical Association met at the World's Columbian

Exposition, popularly known as the Chicago World's Fair of 1893. Visited by millions of awed and delighted Americans, it was as great an event in the civic history of Chicago as it was in the history of the American urban planning movement.

Daniel ("Make no little plans") Burnham, the Chicago architect who designed New York's Flatiron Building between 1901 and 1903, was the most highly regarded city planner of the era. He had done plans for Manila, Cleveland, San Francisco, and Chicago and took the measure of the 1893 fair in a speech to the first important international conference of city planners in London in 1910. "The inception of great planning of public buildings and grounds in the United States was in the World's Fair in Chicago. The beauty of its arrangement and of its building made a profound impression not merely upon the highly educated part of the community, but still more perhaps upon the masses, and this impression has been a lasting one."¹¹

The fair's architects and planners were nationally prominent. Some of them, like Richard Morris Hunt, and the firm of McKim, Mead & White, had had a hand in fashioning baronial Fifth Avenue. As Burnham recounted, the sculptor Augustus Saint-Gaudens was so impressed by the array of talent that he exclaimed to Burnham: "Look here, old fellow, do you realize that this is the greatest meeting of artists since the fifteenth century!"¹² Louis Sullivan, who did the Transportation Building, cursed the architectural impact of the fair, decrying its stress upon the classical style, "the virus of a culture, snobbish and alien to the land . . ."¹³

But, as Burnham had said, the nation loved the gleaming white plaster ensemble of harmoniously grouped buildings, lagoons, and ordered spaces (Fig. 73). Whether as a fleeting reality or a sustained dream, it seemed to wash away all the urban filth and stench and chaos which had left Jane Addams in such despair. The vivid contrast was never seen before. The White City began the "City Beautiful" movement. Its concern for urban appearances and for the city as a monument of grand boulevards and artfully composed civic centers retained vitality long after American city-planning thought had turned to the social aspects of urbanism.

The integrated layout of the fair was a potent stimulus for civic leaders as well as architects across the nation. In its impressive coordination of grand designs by prominent architects, and in the magnitude of its execu-



73. The White City—the Chicago World's Fair, 1893. The Columbian Fountain at lower left, the Hall of Agriculture to the right of basin. View is east toward Lake Michigan. AMERICAN MUSEUM OF PHOTOGRAPHY.

tion, they saw heady possibilities for the enormous tasks of city building.

If the fair was the certain beginning of the planning idea, by 1902 the idea had been turned into a specific demonstration of what planning might mean for the urban future. In that year Burnham, Charles F. McKim, Saint-Gaudens, and Frederick Law Olmsted, Jr. (son of the designer of Central Park), submitted a report as members of the Commission on the Improvement of the Park System for the District of Columbia. The Senate-

appointed group (popularly known as the McMillan Commission, after the Senator who chaired the Committee on the District of Columbia), drew from the implications of the fair and achievable scheme for a great city. The resulting plan, bold and vastly scaled in such design proposals as those for the Lincoln Memorial and the groupings of public buildings along the Mall, earned international enthusiasm as well as the excited approval of President Roosevelt and the country.

Between 1893 and 1902 the idea of planning began to take crude shape. In 1909 it became the core of a nationwide movement when the First National Conference on City Planning met in Washington on May 21-22. It was a genuine beginning in that it was the first time that such a wide-ranging group of Americans had come together for the specific purpose of exchanging views on the problems and prospects of city planning. The subject was still so vaguely outlined and fragmented that it would be more accurate to call it a congeries of interests having something to do with the development of cities rather than a well-defined, let alone a systematic, field of knowledge. Yet a crystallizing idea was at work, for although the conferees were sometimes talking about unconnected things and often on very different levels, they had at least and at last made a serious effort to have common discourse.

There have been other earthbound ideas which had neater origins and untidier destinies. But none began with a more Bunyanesque intention: to understand the American city as a man-made reality; to view the future as a route of years and decades rather than the interval between now and tomorrow; and to act in the belief that Americans could sustain the development of their cities down that route in a rational, publicly controlled effort.

If one man can be credited with the organization of the 1909 conference, he is clearly Benjamin C. Marsh, a laughing, iconoclastic embodiment of the indefatigable muckraker-reformer. Despite his belief in reasonable applications of the principle of root, hog, or die, he lived as if he were a one-man board of home missions for many of the important social causes of the twentieth century. City planning was among the earliest of them.

His parents were in fact New England Congregational missionaries in Bulgaria. After his return to the United States to attend Grinnell College in Iowa, he went to work for the Y.M.C.A., raised funds for church missions, and in 1902 took a fellowship to do graduate work at the University of Pennsylvania. His field of study was the homeless man and his treatment.

In 1903 he was elected secretary of the Pennsylvania Society to Protect Children from Cruelty, but parted company with it because he refused to be silent about his work for better housing when it offended some of the slumlord members of the society's board.¹⁴

In 1907 he became the secretary of the recently organized Committee on Congestion of Population in New York, a group whose founders included three of the most prominent women in the movement for social reform: Mary K. Simkhovitch, director of Greenwich House; Florence Kelley, secretary of the National Consumers League; and Lillian D. Wald, head of the Nurses Settlement and Home Nursing Service. Dissatisfied with remedial tenement house legislation, they planned to mount an exhibit of the appalling housing conditions in the city. The following summer Marsh traveled to Germany and other European countries to gather city planning and housing material. Like many other similarly oriented Americans of the era, he was profoundly impressed by his visit to Germany. Mounted in 1908 on a shoestring budget, the exhibit was, in Marsh's words, "a distinct success from every point of view—except producing action to remedy the conditions shown!"¹⁵

In 1909 the Tammany Hall candidate, William J. Gaynor, was elected mayor of New York. He appointed a City Commission on Congestion of Population. In what was shortly to become the start of a deep-seated zoning tradition, the body had the support of both conservative financial interests as well as reform-oriented civic organizations. Despite a lack of funds, the commission did an impressive job. Its most prominent member was Dr. Frank J. Goodnow, a law professor at Columbia University and later the president of Johns Hopkins. In general, it suggested the extension of controls over construction in the city and public ownership of transportation facilities. Marsh was secretary of this commission as well as secretary of the Congestion Committee.

Marsh had been in Europe in 1907 and 1908 and, out of that travel, in the following year he privately published a small book, *An Introduction to City Planning*. It began with a heading which was the essential message of the work: "A City Without a Plan Is Like a Ship Without a Rudder."¹⁶ Marsh wrote the book to stimulate interest in adopting city plans throughout the nation in hopes that they would "prevent the direful conditions of congestion, maladjustment and pre-eminently land speculation which have reached their horrible limit in Manhattan."¹⁷

According to his findings (and those of other contemporaries as well),

European city planning, particularly in Germany and England, was rooted in a policy of preventing "race deterioration."¹⁸ Medical examinations of applicants for enlistment in the Boer War alarmed British authorities when they found that few men applying from the cities were physically fit. Other students had reported the same concern among German military authorities. The price of the Industrial Revolution and its accompanying urbanism was now being calculated in Darwinian terms, the weakening of the species.

Marsh suggested a program based on such policies as cheap public transportation and the aggressive and widespread acquisition of public urban land. But it was to zoning that he assigned the crucial role. "The most important part of City Planning, as far as the future health of the city is concerned, is the districting of the city into zones or districts in which buildings may be a certain number of stories or feet in height and cover a specified proportion of the site, that is, the determining of the cubage or volume of the buildings."¹⁹ The "Zone System" was the central feature of Germany's urban planning, and it struck Marsh as powerfully as it did others who were promoting the idea of planning for America's cities.

The conference of 1909 on city planning followed the publication of Marsh's book. To prepare the way, Marsh went to Washington with Henry Morgenthau, then the chairman of the Congestion Committee. They met with President Taft and invited him to preside at the conference. Although he expressed great interest, he declined, characteristically fearing that Congress might think he was seizing an initiative which belonged to it. The Marsh-Morgenthau combination was a small version of the alliance of reformer and conservative which appeared in the make-up of the New York City Commission on Congestion.

Morgenthau, then in his early fifties, was a graying, goateed figure whose type has been with the zoning movement literally since its inception in America. Although in 1912 he was to become the chairman of the finance committee of the Democratic party and then a Wilson-appointed Ambassador to Turkey, when he went to Washington with Marsh his credentials were those of real estate operator and financier. Born in Germany, he came to the United States as a child, and after graduating from Columbia Law School he built up a real estate practice. At the turn of the century he got involved in organizing and directing several banks, real estate firms, and the George A. Fuller Company.²⁰

Morgenthau had substantial land holdings in the outlying areas of New York City. As chairman of the Congestion Committee, he had pledged it \$1,500 and provided it with an office. Not much more than an unstable marriage in any case, the particular reformer-conservative relationship that existed between Marsh and Morgenthau was soon to break up over a matter of principle. Marsh was an ardent believer in a policy of transferring taxes from buildings to land values in New York. Having some resemblance to Henry George's single tax on land, the theory behind the transfer (sometimes called differential taxing) was that if increased land values were progressively taxed at much higher rates than building values, there would be a reduction in land speculation and an incentive to improve land rather than hold it idle in hopes of speculative profits. Morgenthau was concerned over the mounting enthusiasm for the differential tax. In view of his real estate interests, he told Marsh that either the committee would have to stop promoting the tax or he would refuse to pay his pledge and ask the committee to leave the office he had provided. Refusing to change the program, Marsh suggested that Morgenthau resign his chairmanship. He resigned. He did not pay his pledge and the committee moved to other quarters.²¹ It was Morgenthau who delivered the address at the 1909 Conference on City Planning in which zoning was made an essential feature of what he called "A National Constructive Programme for City Planning."²²

The conference drew members and guests from many areas of urban affairs. Two federal cabinet officers chaired sessions. Herbert Croly, then the editor of the *Architectural Record*, who had just completed *The Promise of American Life*, was there along with President Carey of Bryn Mawr College and municipal reformer Frederick Howe. Jane Addams and Mary Simkhovitch were on a committee which also included the president of the Baltimore Municipal Art Society. Professional organizations of architects, landscape architects, and civil engineers sent representatives.²³ It was a planning conference with a strong national focus and therein lay its originality. Although it was a two-day meeting over May 21–22, several of the members stayed on in Washington to attend a Senate committee hearing a few days later. Marsh appeared before the Committee on the District of Columbia. His remarks along with statements and the proceedings of the conference were published together as a Senate Document. Appropriately enough, the federal government preserved the historic occasion.

As if to deepen the national implications of the conference and hearten

its prospects, two days before it began the Supreme Court of the United States decided *Welch v. Swasey*,²⁴ holding that height regulations which the Massachusetts legislature had enacted for Boston were constitutional. The legislation established two height districts in Boston, permitting 125-foot structures on certain broad central streets and fixing an 80–100-foot limit on all others. The case would thereafter be cited as conclusive authority for the principle of varying height regulations among different districts in a city, one of the fundamental controls of zoning.

On the evening of May 21, Morgenthau addressed an audience in the auditorium of Washington's Masonic Temple. With overtones of entrepreneurial politics seasoned with Darwinism, he warned his listeners: "There is an evil which is gnawing at the vitals of the country, to remedy which we have come together—an evil that breeds physical disease, moral depravity, discontent, and socialism—and all these must be cured and eradicated or else our great body politic will be weakened. This community can only hold its pre-eminence if the masses that compose it are given a chance to be healthy, moral and self-respecting. If they are forced to live like swine they will lose their vigor." ²⁵

To manage these problems Morgenthau proposed to tighten tenement house controls, move the population away from the center of cities by providing ample transit facilities, furnish playgrounds, and use the adequate available information to measure and plan the growth of cities. In addition, "We can make city plans establishing factory zones and residence zones, and have every building used for residential purposes so arranged that sunlight can reach some part of the building at some time of the day." ²⁶ Elaborating, he added that factories had to be located away from the heart of the city, "and then restrict certain zones surrounding them to one- or two-family houses." ²⁷

If it could be called a program, it was simply the first of an unending series of petty, grand, and modest proposals put forward at the annual meetings to follow. But there was one feature of Morgenthau's speech which was central to all of the early National Conferences on City Planning. In suggesting the idea of planning for zones, Morgenthau struck a major chord of the American planning movement.

In the more than half-century since Morgenthau made the suggestion, it has turned from one of the most stimulating and inviting ideas in an enthusiastic young field into nothing more than a pariah in the eyes of later

generations of American planners. At that same conference two other great chords were sounded. Time has sustained one of them, the garden city. The other was Germany. The memory of its enormous influence on the early years of American planning and zoning was shaken and finally obliterated in the thunder of two wars.

By the time of the First National Conference on City Planning, James Bryce had enjoyed a long reputation as a profound student of American life. In 1907 he was appointed British Ambassador to the United States and two years later was invited to address the conference. Unable to attend, he wrote a letter expressing a view of planning affairs. Its gist was that the proper remedy for the laborer's burden of travel to and from work was to move the work to smaller cities which were healthier and better governed. Along with the idea of decentralizing the great industrial centers Bryce mentioned a new experiment in a garden city near London.²⁸ This was Letchworth, founded in 1903 by Ebenezer Howard, for many years an unknown English court stenographer.

Although Bryce's letter did not reveal the context, he was referring to one of the few radical ideas in modern urban planning. Like the City Beautiful, the garden city has shown a remarkable will to survive—indeed, under a policy of the post-World War II governments of Great Britain, even to prosper.

Initially appearing in 1898 as *Tomorrow: A Peaceful Path to Real Reform*, and reissued in 1902 as *Garden Cities of Tomorrow*,²⁹ Howard's little book was not widely known at first. Academics paid no attention to it. Others dismissed it as either impractical or a fantasy. It eventually came to be honored as a classic of planning literature. The reasons are differently put, but a good deal of its permanent appeal lies in nothing more complicated than the virtuous manner in which Howard took on the colossal problem of trying to humanize urban life in a modern industrial society. The book is thus a kind of moral tract for living a good life in the twentieth century. Gently and simply it attempts to persuade the reader to accept the sweet notion that "Town and country *must be married*, and out of this joyous union will spring a new hope, a new life, a new civilization."³⁰

Lewis Mumford saw tracings of the "balanced community"³¹ in the idea. By helping to define it, Howard suggested both its character and its promise. "A Garden City is a Town designed for healthy living and industry; of a size that makes possible a full measure of social life, but not larger;

surrounded by a rural belt; the whole of the land being in public ownership or held in trust for the community.”³²

The core of the garden city concept is simple and extraordinary: “the size of towns is a proper subject of conscious control.”³³ It is here that the garden city and American zoning at first touched each other at the deepest levels of intention. Then they parted quickly to go their separate, contradictory ways.

In 1903 Letchworth started to arise on several thousand acres of English countryside thirty-five miles north of central London. It was a materialization of Howard’s humane dream. After lecturing throughout Britain for several years, in 1899 he led the formation of the Garden City Association. It recruited men of wide influence in business and public affairs. Thomas Adams became its secretary and later an internationally known town planner. Raymond Unwin and Barry Parker were engaged as Letchworth’s architects. Adams and Unwin made early appearances at the annual national planning conferences in the United States, and the Garden City Association pioneered an international movement whose influence upon American thinking was great and enduring. Little more than a decade after the beginning of Letchworth, American law began to raise another edifice upon the streets of New York to demonstrate a different dream.

The idea of keeping conscious control over the size of towns is a planning idea, bone of the bone. It feeds and lives on a principle of limits. The soul of law is nurtured on exactly the same stuff. By promising to equip the energetic young American planning movement with the controls essential to shape city growth with civilized restraint, the new zoning institution won the hearts of early twentieth-century urban reformers. The prospect of being able to arrange the distribution of urban functions of work and residence, to keep a limiting hand on the height and bulk of urban buildings, and, above all, to have a decisive effect on the concentration of urban populations, was indeed intoxicating. No wonder that in 1911 Frederic C. Howe could see the new planning movement forming and tell Americans in *Hampton’s Magazine* that the foundations of their future city were being laid so well that the American city “is destined to be the most generous, the most humane, the most democratic and possibly the most beautiful city in the world.”³⁴

In his surging optimism, the American reformer also had a great love affair with the German city. The infatuation with zoning was an essential

part of it, for Germany was the culture in which he first saw zoning fully developed. That interlude is crucially important since it worked deep influence on the young American institution.

To understand it one must begin by indulging a fiction, glancing backward to the early part of the century as if through an atmosphere unpolluted by the poisons of two wars with Germany. Then he must correct for an adulation of things European which seemed to grip sophisticated turn-of-the-century Americans more powerfully than it does their modern counterparts. Having made the effort, he will find that early in the century the German city occupied an extremely important role in American urban reform. In view of the virtual oblivion into which it has since fallen, that role now appears to be extraordinary.

Morgenthau broached the zoning proposal for America at the 1909 Conference. At the same meeting Frederick Law Olmsted helped to promote it by carrying it back across the Atlantic. "One of the most fundamentally important features of recent city planning in Europe has been the system of differentiated building regulations . . . [intended] to give each district as nearly as possible just what it wants, to protect it from deterioration at the hands of a selfish minority, and to give stability to its real-estate values." ³⁵ He reported that the real estate men of Hamburg found that their city's zoning regulations were achieving those aims. In addition, the Germans had designed the controls to prevent the spread of congestion to the outlying areas of their cities.

Morgenthau and Olmsted were joined by another speaker at the 1909 Conference who repeated their themes. Frederick L. Ford was the secretary of Hartford's planning commission, the first such organization in the nation (1907). He too dwelled on zoning, "[o]ne of the great questions which will press for an early solution." ³⁶ Germany, he agreed, had founded planning. As Marsh had suggested in his book that year, Germany had been motivated, Ford thought, by the army authorities' concern over the poor health of urban recruits.

The two themes continually recurred and interlocked in both the popular and professional literature of the era. Howe probably had as much to do with fueling American interest as any man in the period. In 1910 he told the National Conference on City Planning: "The Germans . . . have built the most wonderful cities in modern times," and for the next couple of years he continued to repeat such judgments in periodicals like

Harper's Monthly, *World's Work*, *Hampton's*, and *Scribner's*.³⁷ "The German city is the most finished as well as the most efficient political agency in the modern world because it is free, free to experiment, free to have dreams and to realize these dreams in its own way. This awakens the people. It inspires them to effort. It gives them a sense of affection for their city like that which they have for the fatherland."³⁸

Reading this sort of thing in the last third of the twentieth century stirs uneasy visions of thumping beer steins, dueling scars, and hobnailed boots. But Howe had no illusions about what he called an "autocratic caste-controlled country."³⁹

The German impact was pronounced in Britain too. It came there somewhat earlier in the century principally because of an influential book, *The Example of Germany*, by T. C. Horsfall, published in 1904 as an appendix to a report on housing conditions in Manchester. Spurred by the German experience and the serious housing situation at home, he was a tenacious town planning advocate. An admirer suggested he deserved a monument for his dedication to the cause. "Yes," he answered, "and inscribe on the pedestal, 'He could read German.'"⁴⁰

The example of Germany with its widely respected legal institution of zoning raises the question which constantly confronts the wine importer. Does it travel well? To attempt an answer, we need some sense of the environment in which zoning originated. In many respects it was more remote from the culture of the United States than even the broad Atlantic would suggest.

The shape of German history looks curiously like the grand thesis of Frederick Jackson Turner pulled inside out. Instead of developing a unified country with a national character of unruly freedom, the formative experience of the German people produced hundreds of petty states and a blindly subservient personality. In a culture like Germany's, public controls have tended to beget obedience. In an American setting the tendencies have run in the opposite direction, especially at a time like the early twentieth century when the ghost of Herbert Spencer haunted the houses of government.

Like any other abstraction, regulation gets its meaning from specific cases. For zoning, it was a case of privately owned land and buildings. In American society, where the highest court of the land decided that the most modest attempt to control the hours of labor in a bakery was an unconstitutional

invasion of private property rights, and where robber barons could blandly attribute the origins of their plunder to the Deity, one would expect the owners of property to react unkindly to regulation. But for the Germans, there was nothing blasphemous about the idea of government laying its hand on the ark of property. Indeed, the line between public and private interests in property was a good deal more blurred in Germany than it was in the United States. If for hundreds of years their minor princes had tyrannized the German people into patterns of obedience, these rulers had also shown a degree of state initiative which, completely alien to the American tradition, thoroughly prepared Germans to accept the presence of government as the owner and regulator of property as varied as railways, canals, land, forests, and water. Faced with the onset of industrialism and the great urban expansion of the late nineteenth century, it was, as the searching English student of modern Germany, William Harbutt Dawson, observed, "easy and natural for the Germans to apply the principle of public enterprise and effort to modern conditions." ⁴¹

Time wrought other differences too.

After serving as the president of Columbia University, Seth Low was elected reform mayor of New York from 1901 to 1903. Writing out of prodigious experience in the city's municipal affairs, he contributed a chapter to Bryce's great work, *The American Commonwealth*. He entitled it "An American View of Municipal Government in the United States," and in it he argued that "The problem in America has been to make a great city in a few years out of nothing." ⁴² With the notable exception of Berlin, the Germans had been building great cities for centuries. German city building stretched back into the late Middle Ages. Up until the devastating religious wars of the sixteenth and seventeenth centuries, the German cities had been making and concentrating a civilization. By the time of the Reformation, Cologne, founded by the Romans, was a great commercial town in the Rhine region. Lübeck was the pivotal city of the Hanseatic League. Nuremburg and Augsburg were trading and financial centers. Frankfurt-am-Main was the seat of famous fairs which drew Germans from distant places across the land. Learning and the arts flowered in these cities.

They offered escape from medieval serfdom. An ancient proverb promised that "City air makes a man free." ⁴³ And the tradition as it developed was also one of freedom for the city as a political unit, autonomy over its

affairs and its destiny, however local and limited its aims may have been.

Ravaged physically, their rich tradition of urban independence decimated, the ancient free cities came out of the Peace of Westphalia in 1648 in a state of collapse. Their self-government was destroyed, serfdom was revived, and they endured in that condition until the early nineteenth century when modern Germany began to emerge following the disaster of Napoleon's domination from 1806 to 1812.

At a time when Thomas Jefferson was heavily engaged in gathering together a continental United States, the German city began its reascent. It was an expedition sponsored by Prussia.

Barren of natural resources and badly impoverished of human ones as well, Prussia had developed in the east in isolation. In the face of threatened obliteration as an independent state during the Napoleonic occupation, Prussia devised a policy for survival. Its king, Wilhelm III, took the counsel of a group of men who included Baron von und zum Heinrich Friedrich Karl Stein (1757-1831). He was born in Nassau, studied law in several German cities, and settled in Berlin where he entered the service of the Prussian state. He married a countess who was the daughter of a natural son of George II of Great Britain.

With what has been described as Stein's admiration for the free spirit of English self-government clad in German forms,⁴⁴ he convinced Wilhelm that Prussia's survival depended upon drastic changes. One of them involved local government. With no indication that there was either a mass demand or understanding of it, in 1808 Wilhelm issued a decree designed to create free Prussian towns operating in a state whose authority was largely decentralized. The pattern was picked up and copied by other important German states. The planning and zoning powers of the German cities at the turn of the twentieth century had deep roots in this basic arrangement of local government.

It was a system which guaranteed the utmost independence in the conduct of municipal affairs. It provided for an elected assembly and an appointed executive. Into this Anglo-German arrangement was thrust a central principle which Stein took from a law promulgated during the French Revolution. "The communal deputies do not require a special instruction or authority from the citizens, nor are they obliged to account to the latter for their decisions. The law and the election are their authority, their conviction and their view of what is best for the commonweal of the

towns are their instruction, and their conscience the authority to which they have to give account.”⁴⁵

Certainly the text sounded sweeping enough. In fact, it worked out that way. Into local government's hands went substantial powers of finance, taxation, and land acquisition. There thus was under way a restoration of the powerful independence which Germany's towns had enjoyed before the outbreak of the religious wars. By the early twentieth century the Germans had so well equipped their cities with broad powers “that whatever became at any time a ‘communal affair’ fell *ipso facto* within the sphere of the municipal government. As though they had foreseen a vast development of municipal life, they refrained from handicapping the future by undue limitations. Hence it was that when the great era of town extension opened in Germany over forty years ago, the local governments were at once both ready and able to meet their new responsibilities . . .”⁴⁶

Probably the most striking example of the effectiveness of this power was the municipal policy of acquiring land. It was a policy which was not merely suffered, but actively encouraged by the state and central governments of Germany in the nineteenth century. Cities like Frankfurt-am-Main and Mannheim owned about 50 per cent of their land, Stettin more than 60 per cent.⁴⁷ There was no more potent weapon to combat land speculation, since it gave the city effective control over the timing and location of development. This power, coupled with broad taxing powers, equipped the German city with a unique competence in making urban plans effective. One of its important aspects was the bargaining leverage it gave planning authorities in their dealings with private owners.

Early twentieth-century American reformers had the warmest appreciation of this situation. Frederic C. Howe wrote angrily of the starvation of power suffered by American local government.⁴⁸ Seth Low saw it the same way. “The story of municipal reform in the United States is everywhere a story of the effort, by constitutional amendment, to limit the power of the State legislature to interfere with the details of city government.”⁴⁹ In England, too, one heard the same complaints. William H. Dawson reported the widespread pattern of local government struggling in the coils of parliamentary law and judicial interpretation. What appeared to be plain legislation had no certainty until the courts rewrote it. He suggested that probably every town clerk in England eventually had to climb “the stairs that lead to the chambers of some noted parliamentary lawyer in London

in order to ask if this thing may be done and if that must be left undone, and what is the inner meaning of terms and phrases apparently so simple, yet, in fact, beset with endless pitfalls for the unwary." ⁵⁰

In restrained exasperation, Dawson said of England what could just as well have been said of the United States: ". . . one is at times inclined to ask if in our own country, the vaunted home of free institutions, we really understand at all what self-government means." ⁵¹

In the final analysis institutions are but extensions of men. Any consideration of the success of planning and zoning in early twentieth-century German cities would be fatally inadequate unless it took account of the kind of men who were involved with them. Here the cultural disparities between Germany and the United States were the most vivid of all.

With the exception of common membership in *homo sapiens*, the important attributes which Lincoln Steffens found in many of the men running the early twentieth-century American city were utterly lacking in the make-up of the fathers of the German city. For one the city was an object of rapine, for the other, veneration. Corruption contrasted with duty. The American city was often governed by nothing more than a monumental crook, the German by nothing less than the most distinguished burgher. One came to office expecting to take, the other to give.

At another level too there were important distinctions which reflected not public morality but a wholly different approach to the management of government. At least as far back as Andrew Jackson, the prevalent American view was that anyone with a fair amount of wit could master the duties of public office because they could be rendered into simple terms. One consequence of such an attitude was that Americans neither sought nor encouraged specialization or professionalism in public administration. The Germans, on the other hand, had a view which might be called an impulse to overcomplicate if we can call the American's an urge to oversimplify. The Germans expressed it in their frequently fanatical faith in scientific training. The result was that the onset of late nineteenth-century urbanism found their cities, compared with America's, brilliantly prepared with highly trained public executives to take on the complicated new problems of an industrialized urban life. They were not only well trained, but in sharp contrast with American public officials, they were also well paid and well regarded socially.

The last great difference is the most difficult to pin down but may be

the most important of all in attempting to understand the implications of transferring a legal institution like zoning. It has to do with the level of respect a culture gives the great objects which are supposed to benefit from regulation. Here it was the city. One of the basic axioms of American cultural history is stated as either a mistrust or a hatred of the city as an object and a way of life. Dawson was only one of many who found, in stark contrast, that "The German regards his town as a living organism, whose development both deserves and needs to be controlled with the utmost thought and care."⁵² To be sure, the exceptions to such generalizations tend to blur the sharp edges of apparent distinctions between cultures. German housing, for example, was often congested and in Berlin it was built like brutal army barracks. America on the other hand, was as advanced as any nation in its creation of urban free libraries and playgrounds. Still, the central tendencies in the care and development of cities were markedly different between the two cultures. Germany produced no equivalent of Lincoln Steffens because it produced no equivalent urban muck for such a man to rake.

Such genuine distinctions between cultures yield consequences which will eventually appear in the character of their legal institutions. They may show up in the shape of deep assumptions which motivate the original designers of an institution, in the thinking of judges who construe its codes, in the acts of lesser officials who apply its rules day by day, and in the attitudes of citizens whose property is ultimately affected. The fact that they are immeasurable and unpredictable does not negate their existence. It simply enlarges their subtleties.

There were occasional intimations of such matters at the 1911 Conference in Philadelphia. It was like a somewhat confused gathering of the cultural waters of Germany, Great Britain, and the United States.

Against this background, it is not difficult to appreciate why the conference invited Count Johann Heinrich von Bernstorff to be its guest speaker. He was the German Ambassador to the United States. Raymond Unwin and Thomas Adams were visitors from London. Unwin reported on Letchworth and the new garden suburb of Hempstead, suggesting that such developments were effective means of dealing with urban congestion. Although this was but the third national meeting of the planning movement, a distinct pattern of American interests had appeared. It was heavily physical in its attention to such matters as streets and public utilities.

Chairman Olmsted expressed it clearly. "The fact is we are concerned with a single complex subject, namely the intelligent control and guidance of the entire physical growth and alteration of cities." ⁵³

Unwin, like Ebenezer Howard, had his eye on a different kind of thing. "There is one justification and only one for limiting the individual freedom in many ways, as we must do in city life, namely, that the citizen should be given wider opportunities than he could otherwise obtain and a fuller life." ⁵⁴ For him, this was the foundation of city planning and the planner was but the medium through which these goals found expression.

There is nothing more interesting to Americans than foreign criticism, and Adams offered some with English restraint. "I find that there is in this country a spirit of individual liberty which is not to be despised, but which sometimes runs away with itself." ⁵⁵ He was so baffled by the enormous complexity of the American legal system that he could not suggest how the country could go about initiating town planning legislation. But he warned that something had to be done about the low state of housing lest America "lose the very qualities that have built up the strength of this great nation, as well as that which helped to give it birth." ⁵⁶

The prolific American author-lecturer Frederic C. Howe hailed the successes of the German city and bemoaned the impotence of America's. Howe's countryman and fellow reformer, Lawrence Veiller, also spoke. He was the most famous and most qualified housing expert in the nation during the Progressive era and the next decade as well. He was also tough and moral, qualities which did not distinguish him from many other colleagues. Unlike most of them, however, he was not an optimist and had a sparer view of human nature.

The likelihood of getting zoning in the United States seemed to him to be very remote. But he favored it because he believed it would improve housing conditions by preserving residential areas "for all time." ⁵⁷ He also wanted zoning in order to control the height of factory buildings, reminding his listeners of the recent terrible Triangle fire. In fact, the skeptical New Yorker, Veiller, did not like tall buildings of any kind and would have kept the maximum building height in all the nation's cities at sixty feet. Veiller's doubting attitude had broken through in the previous conference as well. He had done as much to fight the evils of urban congestion as any reformer. And no one had done more to smash a number of popular theories prevalent in the new field.

The question of undue concentration of people on urban land was as close to planning's heart as any. It animated the housing movement and was a crucial factor in the garden city movement. (Early in the century Unwin published a famous pamphlet called *Nothing Gained by Overcrowding!*) Yet Veiller found himself unable to define undue concentration. "Frankly, I do not know. I doubt if any one knows." ⁵⁸

His difficulty was more than a semantic one. He also confessed that he did not know the consequences of undue concentration. "In New York's most congested district, the lower East Side, the death-rate for years has been lower than in parts of the city much less densely occupied." ⁵⁹ Mere numbers of people on land seemed to have no significance either. In some portions of the lower East Side there were twelve hundred people to the acre. But the same densities could be found in luxury Fifth Avenue hotels like the St. Regis and the Gotham.

Whatever congestion was, Veiller noted, then destroyed, three theories which sought to explain it. It was said to be the result of exploitation and privilege, yet despite the ubiquity of these factors in American cities most of them were not congested. Low wages were supposed to be a cause, but in New York, where congestion was worst of all, wages were highest. Land speculation and unjust municipal taxation were also alleged as causes. Despite the prevalence of these practices too, only New York and Boston seemed to show any real signs of congestion.

This sort of thing was not in keeping with the usual reformer's attitudes toward urban problems. Some of them had as many questions as Veiller, but few were more informed or less sure of the answers. In challenging what had already become the easy generalizations of planning, Veiller was in reality assaulting a habit of mind which would shortly appear and settle down comfortably in the zoning institution and in other areas of planning as well: the tendency to treat assertion as demonstrable truth.

The American mind is a storehouse of unexamined and deflated propositions. The nation and the age which produced a William Jennings Bryan also produced a Mark Twain. At the same time that Veiller was having at the conventional wisdom Ernst Freund appeared on the planning scene. He had a mind possessed of the finest attributes of German scholarship, an excellent perception of American ways, and the bizarre blessings conferred upon any mind permanently immersed in the law. No one in the history of the zoning institution had a better developed sensitivity to the

perverse subtleties involved in trying to make a German institution function in an American setting. He was a two-culture man.

Freund (1864–1932) was born in New York while his family was on a brief visit from Germany. He was educated in Germany and took a law degree at Heidelberg in 1884. He emigrated to the United States, practiced law in New York City, and in 1892 began a teaching career at Columbia College. In 1894 he joined the political science faculty of the new University of Chicago and in 1902 became a professor in its recently established law school.⁶⁰ He spent the rest of his life at Chicago teaching and writing prolifically in the broad field of public law. In 1904 he published his great work, *The Police Power*. It was for years the definitive treatise on the subject and would be cited endlessly as learned authority for the constitutionality of using the police power to enact zoning.

Freund spoke to the National Conference on City Planning in 1911 and 1913. Each time his message was the same: Germany and the United States are different, and the differences ought to be heeded. He frankly doubted whether American cities could be entrusted with the power to zone. In an effort to illustrate how different they were, he suggested a comparison between a generation of development in New York and in Frankfurt. Each had increased by relatively the same numbers in population.

In Frankfurt the business district is now exactly where it was; no neighborhood, no quarter of Frankfurt has changed its character—excepting of course the quarter that has been added to the city. New York, as you all know, has profoundly changed. Residence districts have first become business districts; and now they have become factory districts. In other words, in Germany property is conservative, and in this country it is not. Therefore, the districting power in Germany means that it simply registers conditions that are more or less permanent; in this country, it would mean that the city would impose a character upon a neighborhood which that neighborhood, in the course of time, would throw off.

The development of the property of a neighborhood in this country, it seems to me, is beyond the wit of man to foresee. It seems capricious; and I don't believe it is within the wisdom or the foresight of a city council to attempt to control developments of that kind. If this observation is true, it is better that a districting power should not be given to a city at the present time.⁶¹

Conceding that height controls might be appropriate, he also questioned whether the real clue to German success was in the existence of wider

powers than those enjoyed by American cities. A town like Frankfurt, he thought, got its great improvements more through presumably benign influences than through exercised authority. The rejoinders in the ensuing discussion turned his argument back on him. They suggested that rapid change constituted all the more reason to impose zoning controls.

When he returned to the 1913 Conference Freund talked about power in much the same way, doubting that the American city was really quite as impotent as had frequently been suggested. The great difference between the cities of Germany and those of the United States lay in the sphere of land ownership. Here, he thought, was the key to much of Germany's urban accomplishment, "but I am sure we should not be willing to grant to any American city the power to go into the market to buy and sell real estate for any but a public purpose. It requires the noble confidence the Germans have in their authorities, and the noble way in which the German authorities deserve that confidence that makes such a power possible and desirable." ⁶²

Height control, the first kind of zoning regulation to appear in the United States, provided an early clue to what might happen once the whole bundle of zoning controls was installed in the American city. In 1912 San Diego passed height control legislation which was hailed as the most progressive in the nation. Within several months its hundred-foot limitation had been raised to 150 feet due to pressure from the city's real estate faction which "consists of about twelve elevenths of all the population . . ." ⁶³ The reporter of this event felt that the United States would ultimately have to look to Germany to get some ideas about effective height control.

For all his skepticism about zoning and all the other panaceas for urban ills, Lawrence Veiller felt much the same way. He finally confessed "that we have cast somewhat longing eyes at the shores of Germany and wondered whether there was something so essentially different in the atmosphere of Germany and America that it would be impossible for us to engraft upon American civilization the well-established principle of zoning that has been in operation for a generation or more in that country."

His residue of optimism finally showed through. "'A man's a man for a' that,' and it has seemed to some of us that there was not such an essential difference between the human characteristics of the German and the American as to make it a frantic imagining or Utopian dream for even us in America to expect that the time might come when we might insure to

our citizens the right to live in a peaceful and untrammelled atmosphere . . ." 64

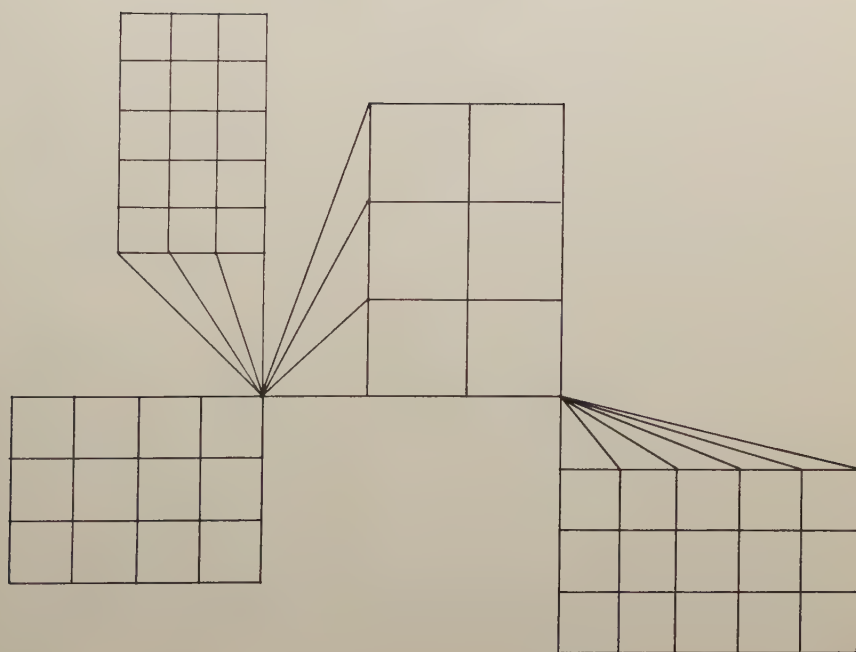
By the time Veiller said this he was caught up in the pioneering New York effort to bring the first comprehensive zoning law to the United States. Five months earlier New York City had published a monumental document bearing the title, *Report of the Heights of Buildings Commission to the Committee on the Height, Size and Arrangement of Buildings of the Board of Estimate and Apportionment of the City of New York*.

The New York experience bottomed this report, as influential a work as any in zoning's history. Unquestionably, zoning would have appeared in America's cities if there had never been a New York experience. We need go no further than the early planning conferences to know that zoning had engaged many influential men around the country. Elements of the comprehensive zoning institution—height regulation and land-use segregation—were functioning as law well before the New York resolution was finally enacted in 1916. Nor did the technical details of the resolution innovate any law which could and would not have been fashioned in some other American city.

But if the New York experience had not occurred, the institution would have been denied New York's unique influences: a tempo and a concentration of prosaic and extravagant events, a power both to contain and anticipate those varieties of national experience which can be as chimerical as ladies' fashions and durable as law.

And if there had been no New York experience. American cities would have had to look elsewhere for the example of the nation's first comprehensive zoning law. Certainly they would have found it not too long after 1916. But the fact that the pioneering city was also the largest city in the nation made the effort the most impressive of beginnings. Simply by lending its imprint, New York caused the institution to spread more rapidly than it would have if zoning had been born in some other city. The accelerative effect of this example and the impact of the key men involved in its creation caused one of the most remarkable proliferations of law in American history.

New York's other unique contribution was the 1913 Report. The extent of its preparation, the range of its inquiry, and the disclosure of the kinds of forces which breed public controls in America preserve an essential insight into the connections between a culture and its law.



As the century turned, New York City was very much a part of the larger national impulse toward reform. Here in this period the handful of men who made America's first zoning law got their postgraduate training for the work they set about doing between 1913 and 1916.

Tammany Hall, the city's Democratic organization and long-time example of the corrupt urban political machine, was defeated in the mayoralty election of 1901 when Seth Low was elected on a reform wave. George B. McClellan succeeded him in 1903 and served until 1910. Despite Tammany's original sponsorship of McClellan, he sustained the drive for reform. It was during his tenure and his successor's, that of the strange political maverick William J. Gaynor, that a major portion of the city's subway system was designed and built. This massive public project was an important shaping experience for the careers of George McAneny and Edward M. Bassett. McAneny was the most influential public official to champion zoning's cause; and if American zoning has a father, he is Bassett.

By the time he was elected president of the Borough of Manhattan (1910–1913), McAneny had worked as a reporter for several New York newspapers for some years—the same years as Jacob Riis. Between 1892 and 1902 McAneny held office in both the national and New York State civil service reform movement. He practiced law for several years. Then, between 1906 and 1909, he headed the City Club, one of New York's most effective municipal reform groups. In 1916, the year of the passage of New York's first zoning law, McAneny occupied the strategic office of president of the city's Board of Aldermen. Planning and zoning had no

more ardent promoter. He subsequently became the executive manager of the *New York Times*, chairman of the state transit commission, a member of the Russell Sage Foundation, and president of the Regional Plan Association.¹

Bassett (1863–1948) was born in Brooklyn.² He was educated at Amherst, where he excelled at his studies and became an intimate friend of Arthur P. Rugg, later Chief Justice of the Supreme Court of Massachusetts. From there he attended Columbia Law School and spent a good deal of his time at his Brooklyn home studying with his fellow law student, Charles Evans Hughes. Among his other major offices, Hughes subsequently became a reform governor of New York, the Republican presidential candidate whom Woodrow Wilson defeated in the election of 1916, and Chief Justice of the United States. Bassett practiced in Buffalo from 1886 to 1892. During that period he was engaged in counseling the developers of waterworks in upstate New York, the first of a number of his professional involvements in large public construction projects.

He returned to Brooklyn early in the century, got involved in school board affairs, and in 1903 was elected as a Democrat to a term in the House of Representatives. In 1907 Governor Hughes appointed him to the Public Service Commission.

In 1908 Bassett made a trip to Germany, a country he had visited before. Werner Hegemann, a noted German planner, had prepared a vast city-planning exhibition for Düsseldorf. It was done with provocative models and illustrations demonstrating the improvement of parks, streets, and public buildings. Bassett was “taken off my feet by the impressions given me by these new fields of work.”³ When Bassett returned to New York, a long-time friend and another of zoning’s founders, Nelson P. Lewis, chief engineer of New York City’s Board of Estimate, urged him to join the new National Conference on City Planning, which he did. Having no permanent taste for politicians, Bassett now found himself in the midst of sympathetic people like architects and engineers who were beginning to make a promising discipline out of their shared enthusiasm for the burgeoning ideas of city planning.

The new field and the unexamined possibilities of progress were intoxicating challenges to Bassett to start another career. “I realized that I had found the kind of work that interested me and I foresaw that the whole subject was almost unexplored in this country and that it offered a vast

field of progressive legislation.”⁴ Out of the same stimulus came his lawyer’s insight “that most of the objects could be secured through the police power and not necessarily by taxation.”⁵

Put in the most elemental terms, terms which are by no means oversimplified, Bassett became convinced that many great improvements in city building could come without government’s having to pay private citizens for the restraints imposed on their property. He spent something like the next fifteen years of his professional life persuading New York City and then cities and courts in the rest of the nation that zoning was just such an improvement.

At the age of seventy-six he weighed his years and concluded that “my zoning work has been the best contribution of my life.”⁶ It was characteristically both an honest and a modest judgment. Despite his suggestions to the contrary, Bassett did in fact do more than any man to make an American legal institution out of the idea of zoning. Not only through zoning, but in other respects too he left a permanent imprint on New York. McAneny credited him with the planning of five new river tunnels, bridges, and the dispersed terminals for its subway system.⁷

As a result of his great involvement in the new subway system, during 1912 Bassett had been meeting with McAneny and other city officials about the serious congestion developing in the skyscraper area in lower Manhattan. When they went into service the new subways quickly began to aggravate the already serious skyscraper problem by delivering great numbers of office workers into a very small area of Manhattan. Bassett wanted regulations which would prevent the private exploitation of downtown sections about to be made accessible by further subway extensions. In 1912 no such controls existed.

His concern for this problem grew from a broad view of urban life. Bassett was deeply impressed and heartened by what he had seen in Germany and later Letchworth. He believed in deconcentration—the wide distribution of places of work and homes—and felt keenly that the American city needed to break its pattern of heavy residential density. Germany was changing it and new English town planning legislation seemed to point in the same direction.⁸

While these thoughts were crystallizing in Bassett’s mind, Robert Grier Cooke and his Fifth Avenue Association had been working diligently to shape public thinking about their problem on Fifth Avenue, the garment

industry. After four years of fruitless pressing for a solution to the loft-building problem, the association turned its energies to getting public backing for its demands. In this cause it enlisted Borough President McAneny, who, as a result, appointed a Fifth Avenue Commission. Of the seven members, six were also association members. Arnold W. Brunner, a prominent architect, was its president and Cooke its secretary. In March 1912 the commission recommended a flat height limitation of 125 feet for all buildings on Fifth Avenue and 300 feet to the east and west. The point of the recommendation was quite clear, but its method was indirect. If building height were limited, further garment loft building would be discouraged and would presumably go elsewhere to areas without such restrictions.

In May 1912 McAneny introduced substantially that recommendation to the powerful Board of Estimate and Apportionment. Nothing was done about it. During the summer and early winter of 1912 Cooke arranged meetings with McAneny to push the association's interests. This was, of course, the same period in which Bassett had begun his meetings with McAneny and others about congestion in lower Manhattan. McAneny initiated the crucial proposal for a new commission to deal with the question of height control.⁹ What was shortly to be created as the Heights of Buildings Commission was thus the direct outgrowth of pressures which had originated in the combination of a private commercial group fighting to protect its parochial interests and the much broader concern of at least two individuals who were archetypal reformers. But unlike many of their reforming colleagues, Bassett and McAneny were more than promoters of the public weal. They were also to be honest brokers in a transaction which was supposed to strike a useful public accommodation between limited private demands and the wide-reaching needs of the nation's largest city. The earlier combination of a Morgenthau and a Marsh had now reappeared in the setting of specific problems in a specific city. These interests had organized around a common objective, height control. McAneny gave it the grand theme, planning.

McAneny spoke to a City Club luncheon about a month after the creation of the Heights of Buildings Commission. The format was Anglo-German. Joining him as guest speakers were Werner Hegemann, the prominent German planner, and E. G. Culpin, secretary of the Garden Cities and Town Planning Association of Great Britain. Hegemann

described the conditions on lower Broadway as "the worst . . . the world has ever seen." Culpin spoke glowingly of Letchworth.¹⁰

As for McAneny, he happily suggested that the commission "is a wedge into the problem of city planning, I am frank to admit, now that I have obtained [its] appointment . . ." Like the combination of forces promoting the controls, the sequence which McAneny suggested was also to become a classic American formula. Zoning came before planning.

In the previous month, on February 27, 1913, McAneny had introduced to the Board of Estimate and Apportionment the resolution whose passage created the new commission. Its opening statement announced the purpose of the new body: "There is a growing sentiment in the community to the effect that the time has come when effort should be made to regulate the height, size and arrangement of buildings erected within the limits of the City of New York; in order to arrest the seriously increasing evil of the shutting off of light and air from other buildings and from the public streets, to prevent unwholesome and dangerous congestion both in living conditions and in street and transit traffic and to reduce the hazards of fire and peril to life . . ." ¹¹ The commission was told to investigate the advisability of dividing the city into districts or zones.

The McAneny resolution actually created a committee of three elected officials, the borough presidents of Manhattan, Brooklyn, and the Bronx. It was this committee which appointed the commission, the group which did the pioneering work of defining the problems, investigating and designing possible solutions, and defending the legality of their recommendations. The nineteen commission members were on the whole prominent citizens several of whom were men of deserved distinction. There were more realtors than men from any other calling, but architects and lawyers were also well represented along with the Fifth Avenue Association.

The combination was an early example of a coming conventional pattern. Although not unique to zoning, the process of building an American legal institution by combining technical skills, political power, and substantial lay strength is ultimately intended to be a process of politics. It is designed to insure that whatever proposals result will be politically feasible. Given the American system, its hallmark is the special kind of compromise resulting from the pulling and tugging of the participants. But here little of that was involved. There were really only two groups, they were not basically antagonists, and only one of them had its hands on the levers

of municipal power, those with a stake in the ownership of the property which might be affected. The other group, the reformer-planner types like Bassett, not only had no equivalent power but furthermore were essentially in sympathy with the objectives of the owners, however divergent their reasons. Despite genuine professions about making zoning the major instrument of American urban planning, their pioneering work turned out to be an exercise in drafting the will of a handful of New York's property holders. The 1913 Report is the historically important heart of this process.

Bassett was chosen commission chairman. Along with three other members, he was at the center of the commission's reform element.

At the time of his appointment in 1913, Abram I. Elkus had been laboring in the vineyard of reform for some years. A journal of the period called him "one of the ablest and most public spirited lawyers in New York."¹² A graduate of City College and Columbia Law School, Elkus had spent a good part of his law career campaigning to eradicate bankruptcy frauds and improve the conditions of labor for New York's women and children. He was counsel to the New York State Factory Investigating Committee created by the state legislature as a result of the Triangle fire of 1911. He ran unsuccessfully on the Democratic ticket for a seat on the New York Court of Appeals, the highest court of the state, and in 1916 President Wilson appointed him ambassador to Turkey, succeeding Henry Morgenthau. His tour at Constantinople was brief and ended when Turkey broke diplomatic relations with the United States in 1917.

Lawson Purdy was one of the city's officials on the commission. He was chosen vice-chairman. By the time of that appointment he was a shining light in American municipal government. A strikingly handsome and urbane man who could have modeled for the Arrow Shirt advertisements of the period, Purdy was a clergyman's son who was educated at St. Paul's and Trinity College in Hartford. Starting his career with a banknote company, he left to study law and quickly got interested in tax reform. He developed a talent for public speaking from his experience on a Madison Square soapbox where he argued tax reform to evening strollers. Under Henry George's influence he became secretary of the New York Tax Reform Association. The experience led to his appointment as president of the City's Tax Commission in 1906, an office he held through several administrations of the city's government.¹³

Three years after his appointment to the 1913 Commission, Purdy was elected president of the National Municipal League. He was the very

model of a good city government man, an odd class of American whose inability to enlarge its numbers is matched by its obstinate refusal to disappear from the urban scene.

He died in 1959 at the age of ninety-five. About ten years earlier he had described himself as "an old fashioned, Herbert Spencer [sic] individualist and I believe that the government should keep its hands off."¹⁴ In the light of his reformer's reputation, if it seems curious that Purdy should classify himself that way in the twilight of his life, it was at least consistent with his beliefs during his years on the commission. "It is good individualistic doctrine that a man shouldn't use his land so as to injure another. I started with the ideas of Herbert Spencer and Henry George that all men by birth have an equal right to the use of the earth."¹⁵

Lawrence Veiller was to the cause of decent urban housing what Purdy was to urban tax reform. He detested the slum, "The vault, that sink of iniquity and relic of barbarism . . ." ¹⁶ For years he served as secretary of the National Housing Association. He came up through one of the great turn-of-the-century training grounds for reformers, the settlement house. What he saw during the panic of 1893 convinced him "at the mature age of 20 years that the improvement of the homes of the people was the starting point of everything." ¹⁷

As his role at the early National Conference on City Planning revealed, Veiller was a reformer with an atypical set of views. He was not at first especially enamored of either zoning or the garden city,¹⁸ and despite his encyclopedic knowledge of American housing, he remained very skeptical about the usual explanations for its difficulties. Yet, very much in keeping with the spirit of his times, in 1911 he was able to write that "The slum, the mother of disease, is now doomed. Its end is in sight." ¹⁹

Of the remaining members of the commission, two deserve a word to suggest the backgrounds they brought to the task. C. Grant LaFarge was a distinguished architect who had designed churches and other buildings throughout the nation. By 1914 he had served as president of the New York chapter of the American Institute of Architects and the Architectural League. For many years he was associated with his father, John, in the design and execution of New York's vast Cathedral of St. John the Divine, a work which commenced in 1891 and three-quarters of a century later enjoyed the distinction of being the largest two-thirds-completed church in the world.

George T. Mortimer was one of the four commissioners directly con-

nected with real estate interests. He probably had more experience with skyscrapers than any of his colleagues. At the time of his appointment, he was vice-president of the United States Realty Company which controlled some of lower Manhattan's tallest buildings. His firm owned two of them across the street from 120 Broadway, the site of the new Equitable Building. It was he who led the opposition of the building owners who proposed to Louis Horowitz that Coleman duPont make a park out of 120 Broadway. When the Equitable Building was completed several years later, Horowitz resigned as president of the Equitable Office Building Corporation and duPont gave Mortimer the job of managing it.²⁰

Many years after its appointment Veiller correctly concluded that the 1913 Commission marked the beginning of the zoning movement in America.²¹ The commission was created ostensibly because of only two problems, the skyscraper and Fifth Avenue. Its 300-page Report is the spawn of those problems. They were as exotic as anything that emergent urban America had created and yet one of the most significant qualities about the report is its universality. Any other street or structure could have been the source of problems and the result would have been the same, for the ultimate issues demanding resolution all involved the management of urban growth and change, and the scheme of American values which would decide how such questions ought to be answered.

The Heights of Buildings Commission began its work with no clear notion of what it was supposed to do or how to do it. As Purdy later reported: "And so we fumbled along with the idea of zoning in mind. It seemed to us that if we could allay fear of damage to property, we could then get ahead. New York businessmen were afraid that we would impose rules on them that would hurt the value of their land . . ." ²² To still their fears, Purdy drew up a resolution to guide the commissioners. They were supposed to quote it to anxiety-ridden owners to assure them that the commission would "pay reasonable regard to the character of buildings in making its zoning regulations in order to enhance the value of land and conserve the value of buildings." ²³ Incredibly enough, one of Purdy's colleagues who viewed him as a radical suspected the motives behind the resolution, and so it was deferred. But in the end it was embodied in the 1916 law, "and this was the principle we followed in the zoning to raise the value of land." ²⁴

During the spring of 1913 the commissioners held a number of informal

meetings with businessmen in the city in an effort both to learn and to teach. At the same time, the Fifth Avenue Association made frequent appearances in the press. It reminded the public that it deserved the major share of the credit for getting McAneny to introduce the Fifth Avenue height resolution to the Board of Estimate and Apportionment, and that it was committed to preventing any more loft manufacturing buildings on Fifth Avenue.

Coupled with these statements came Robert Grier Cooke's formula for justifying the height controls. First was the specter of midday crowds now ruining Fifth Avenue below Twenty-third Street. "Nothing so blasting to the best class of business and property interests has ever been seen or known in any great retail district in any large city as this vast flood of workers which sweeps down the pavements at noontime every day and literally overwhelms and engulfs shops, shopkeepers and the shopping public." It was "appalling."²⁵

Added to these pedestrian complaints about loss of business were spiritual considerations. He told his readers that "there is no street for which Americans have a higher sentimental regard than Fifth Avenue . . ." ²⁶ It was not clear in just what history Cooke believed these sentiments were rooted. If he had felt America's pulse accurately, he would have added that it was not the newly arriving department stores which brought on the warm glow.

Cooke's technique of appealing to the public's affection for Fifth Avenue was mixed with his custodial outrage over what was going on. "It is high time to put a stop to the operations of a certain type of builders, who, growing more and more bold as the years have gone by, have ruthlessly invaded neighborhood after neighborhood in New York and entered upon a riot of building out of all proportion to the character and needs of the district."²⁷ Just a few years earlier that statement would have sounded precisely like the accusations the barons were making about many of the merchants who now composed the indignant Fifth Avenue Association.

The association's formula was both a protest against loss of property values and a vilification of the "cheaper class of tenants" and "conscienceless builders." Like the bellicose themes, these too quickly became standard zoning rhetoric. The association kept it up until the passage of the law in 1916. Then the rest of the nation borrowed the recipe of real

estate values and snobbery and quickly carried it over into the residential areas of its cities.

The opening quarter of the 1913 Report is a discussion of the problems of Fifth Avenue and the skyscraper, and the possible methods for controlling them. It contains a brief legal argument in favor of the constitutionality of zoning. The central portion is a series of very detailed technical studies of building controls in the United States, Canada, and Europe. Attorney Frank Backus Williams conducted the most exhaustive of them on a commission-financed trip to Germany. From this investigation he prepared an elaborate account of the zoning experience in Germany's cities. While still abroad he wrote a full-page story for the Sunday *New York Times* which carried the head "Germany Can Aid New York in Skyscraper Problem."²⁸

The concluding section of the report is an extensive collection of statements which interested individuals filed with the commission. Like the opening portion of the report, they yield valuable evidence about the formative culture of American zoning.

The entire task was completed in little more than six months, and the report was published on December 23, 1913. It was all done within an allotted budget of fifteen thousand dollars. By adjusted modern standards, if there were nothing else to commend the work, its timetable and the cost were extraordinarily abbreviated.

From the outset the report put great stress on the urgency of finding a remedy for the conditions on Fifth Avenue. But the commissioners declined to file a preliminary report because "The injury that is being done to Fifth Avenue is not an isolated problem, but part of a problem that confronts the entire city."²⁹ Believing that existing legislation was inadequate to support the proposed solution, they sought to strengthen its legality by applying it not only to Fifth Avenue but to streets similarly situated throughout the city as well.

The discussion of the skyscraper opens with a statistical account of the height of Manhattan buildings. It finds what contemporary views clearly reveal. In the main, buildings were actually low-lying, averaging less than five stories for the entire island.³⁰ This was little more than the traditional height of the Italianate brownstones that had been strung out along Fifth Avenue for decades. Out of Manhattan's ninety-three thousand structures little more than 1 per cent exceeded ten stories. Most of those ranged

from ten to seventeen stories, and only nine went above thirty stories. The Woolworth Building was the highest.³¹ The problem of the skyscraper was actually confined to Fifth Avenue and the small area of lower Manhattan enmeshed in the old streets of the financial district which included Broadway, Nassau Street, Trinity Place, Church Street, New Street, and Exchange Place.

For all the drama that the office skyscrapers were adding to the island's profile and temper, the curious fact was that it was not they but the hotels and department stores which held title to the highest average height. But, the report states, "It is clear therefore that while hotels have the greatest average height, the much greater proportion of high office buildings and their concentration in a few areas make the determination of a maximum rule applicable to all buildings very largely a question of determining what rule will be most appropriate for office buildings in the areas of maximum congestion."³² Thus, the discipline of the tall office building would set the mold into which the large solution would be poured.

In the commissioners' view, the skyscraper problem was actually several problems. Despite existing requirements that they had to be thoroughly fireproof, "tall buildings are not necessarily safe."³³ Inflammable materials were said to be frequently stored in their rooms. Should fire break out, their elevator shafts could act like chimneys, and the grease on elevator guides might spread the flames up the shafts. Fire department equipment could handle nothing above a hundred feet. Beyond that firemen had to rely upon building standpipes, and they were no better than a fireman's ability to get to them.

There was also the serious possibility of panic. Aggravating the panic was the extreme confinement of streets in the financial district. On the assumption that certain of those streets were cleared of all pedestrians and vehicles, if a general catastrophe occurred and all the tall buildings in the area had to be evacuated, Broadway could have accommodated only 96 per cent of the occupants of its abutting buildings. Exchange Place had space for little more than a third. "This being the situation to-day the question arises as to what might happen in case of a general panic should the entire district be solidly built up with buildings of the present extreme heights."³⁴

When crowded together, skyscrapers were supposed to threaten public health. Noting that in some areas of lower Manhattan artificial light had

to be used even during the sunniest portion of the day, the report argued that dark offices caused much eyestrain. "Nothing but adequate natural light seems to prevent it."³⁵ In addition, tuberculosis experts reported that many cases of the disease were traceable to employment in dark offices. It was also claimed that sick leaves increased when firms moved from light to dark offices.

Congestion in a number of lower Manhattan streets harmed public comfort and convenience. The sidewalks were simply too small to accommodate so many people. New Street was worst of all. It could handle only about 20 per cent of the occupants of its buildings. The report calculated that if Exchange Place were uniformly built up to an average of thirty stories, its sidewalks could take about 8 per cent of its buildings' occupants.

The final problem of the skyscraper was its impact on property values. The basic premise was that "Few skyscrapers pay large net returns."³⁶ That premise rested on the notoriously high cost of their construction. In tall buildings the net rentable ground-floor space was "worth on the average as much as that of the third to the eighth floors inclusive."³⁷ However, the requirements of structural elements such as columns and ducts sacrificed ever greater amounts of net rentable ground-floor space as the building went higher. The commissioners concluded that a ten-story building would save two-thirds of the net rentable space lost on the ground floor of a twenty-story structure. If they were correct, it turned out that there was some relatively low point of diminishing returns for what had seemed to be the limitless financial promise of the steel-frame building.

But, they continued, even if the skyscraper could return a moderate profit, its financial success was jeopardized if the daylight on the building were stolen by adjacent skyscrapers. "As a rule in an area in which high buildings predominate the rentals are lowest and the percentages of vacancies greatest on the lower floors above the second."³⁸ To clinch this argument, they added the consensus of Boston real estate men who ten years earlier had been the most active opponents of height limits for their city. By 1913 they were staunchly in favor of the controls because they had been "an unqualified success."³⁹

In 1913 New York was virtually without any direct controls over height. The prominent exception was apartment and tenement houses. They were held to one and a half times the width of the widest abutting street. Controls over open space—the unoccupied portions of a building's site—varied

considerably. There were no such limitations for factories, stores, and warehouses. They could and did fill entire lots.

At the time a number of cities, Chicago and Baltimore for example, had direct, city-wide controls over height. The pattern varied throughout the nation. In some cities control was based on a maximum footage, in others the maximum was conditioned by a multiple of street width. And in some cities like Boston and Washington, different districts of the city were subject to different height regulations. Among those which imposed controls, Milwaukee permitted the greatest rise, 225 feet.

The controls in the cities of Scotland, England, Germany, France, Italy, Sweden, and Austria varied strikingly. In no case did the limit exceed eighty-two feet (Vienna), and in most cases it ranged around seventy.⁴⁰

Despite their numbers, examples such as Boston and Washington should not obscure the fact that in 1913 most American cities simply had no height controls of any kind. When they did curb their builders' enthusiasm, American cities held them to a limit some three times the height of anything European cities would tolerate. These marked vertical contrasts between urban buildings on the two continents were symptoms of a difference between deeply rooted cultural attitudes about the appearance of a city. Several prominent American architects who filed statements with the commission underscored that difference. Paradoxically, it was the variety of their views which made the contrast so vivid.

The urban building cannot be an isolated visual experience. Even when it stands alone, it will have at least a relationship to its street or square. The relationship grows more complex as the eye takes in other buildings. The design of these relationships is either an important part of architecture as Louis Sullivan argued so passionately or else it is the haphazard result of random building as New York has demonstrated so spectacularly. Whatever else they meant to accomplish, European controls were typically and deliberately fashioned to embody some generally accepted architectural principle in law. America expressed the converse of that attitude in its virtual absence of any height control. One of the unintended and intriguing disclosures of the 1913 Report was the disarray of American architectural thought about a question as basic as the height of an urban building.

Representing the New York chapter of the American Institute of Architects, Ernest Flagg submitted a lengthy statement to the commission. Flagg

had designed the Singer Building. He had also done a number of the city's great townhouses. He wanted to stop the damaging effects of high buildings, their congestion, their light-stealing, and the general disfigurement they imposed on the city by "giving to the streets a wild, western, ragged air, incompatible with dignity, order or sobriety of appearance."⁴¹

He said that Europe had the best aesthetic answer, a simple limitation of height based on a principle. Where the high building existed, the damage had been done. But where there were no high buildings, Flagg believed that the principle ought to be followed. "It is a thing which is perfectly well understood in all the great cities of Europe, and neither the introduction of the steel-frame method of construction nor the elevator, those two factors which have wrought such a change in our method of building, have been able, so far as I know, in a single instance to induce a city of the Old World to depart from its standard of height. Their experience has taught them that the necessary limit of height for buildings is equal to about once the width of the street and that it would be folly to exceed it."⁴²

The difficulty with Flagg's position was that this canon which was supposed to shape a cityscape of civilized restraint in Europe would prevent what Flagg himself recognized as the distinctly American and occasionally handsome effects of the skyscraper. To steer his way through the dilemma he proposed a mixed set of controls, the European discipline for low buildings, but an American freedom for the soaring towers. They ought to have no height limitations so long as they occupied a relatively small portion of their sites.

In the same group of architects was Electus D. Litchfield, who several years earlier had served on a public committee which had gone into the question of height controls. Perhaps it was for that reason that when he appeared before the commission he seemed rather cowed by the law's rejection of aesthetics as a valid basis for controls. He ended up by presenting for the skyscraper what was as much a timid lawyer's brief for conventional possibilities as an architect's conviction of what his learning might have taught him. On the theory (hardly aesthetic) that light, air, and sanitation considerations justified controls over the buildings, he proposed that the limitations be upon volume rather than height. In this way, the upper stories could be squeezed or set back into towers which would at least open the higher portions of adjacent skyscrapers to light and air. Indeed, he loved New York's towers but simply deplored the fact that they were jammed together.

A variation on this approach appeared in the statement of Thomas Hastings, a member of Carrère and Hastings, one of the nation's most prominent architectural firms. He was convinced that the lack of height control was "the greatest calamity that has ever come to any municipality."⁴³ Like the proposal which his late partner, John M. Carrère, had suggested earlier,⁴⁴ he thought the way into the problem was through the tax mechanism, putting a progressive levy on building height. The higher the building the higher the tax. He specifically rejected aesthetics as a useful approach to the question. Thus, rather than protect and promote what Flagg had said was a thoroughly established aesthetic principle, this arrangement would have allowed its violation so long as an owner could foot the tax bill.

These were by no means all of the differences among the many architects who appeared. A Philadelphian was impressed by the view that the "nausea limit" for elevator passengers (720 feet a minute for men, 600 for women) had about been reached, and "we may therefore accept as a scientific datum the present opinion of engineers in New York that the limit of business buildings due to the limited speed of elevators is between 25 and 30 stories."⁴⁵ For him the best solution was to isolate the upper stories of tall buildings by requiring, in some unspecified manner, the builder to buy enough land for this purpose.

If there was nothing like professional agreement on an aesthetic for the tall building, there was just as little consensus on where questions of beauty belonged in an overall scheme of controlling values. It was as if the early twentieth-century architect were struggling to find some principled resolution between the powerful traditions of European architecture, which often dominated his formal education, and the powerful immediacy of an American experience, which even more often dominated his client's demands. It was precisely this struggle which Montgomery Schuyler had written about in his effort to understand how the Chicago School fit into the setting of an American culture of the turn of the century.

There was at least one effort to compose a professional answer to these conflicting demands. Landscape architect Robert Anderson Pope⁴⁶ thought that the priority of values which determined building height ought to turn on the function of a building. The relative importance of utility, hygiene (light and air), and aesthetics shifted depending upon the urban area in which the building was to stand. If it was to be in a civic area, aesthetics ought to control. In residential areas, that was of secondary importance. It

was least important in business areas. There, the question of utility ought to dominate.

Such disparate advice surely did not make the commissioners' task any easier. The laconic contribution of a Boston architect was the clearest professional statement they got and also the least useful. "Mr. Austin said he was glad that the high buildings were in New York and not in Boston." ⁴⁷

If the commissioners yearned for certainty, no party gave them more gratification than the Fifth Avenue merchant speaking through his association. During the six years of its existence it had built its effectiveness from a formula which, of all the interest groups in a highly pluralistic society, was peculiarly the invention of the business community. It was well organized, well financed, and it knew exactly what it wanted. In 1913 the retail merchant and the landowners along the avenue lacked the final element which would clinch an early twentieth-century success, a will to group social Darwinism. Between 1913 and 1916 they would get that.

They wanted the garment industry to get out of Fifth Avenue, or, at the very least, they wanted it literally held down. They wanted this because the things which were the essences of the garment industry—the strange tongues, the outlandish appearance and the very smell of its immigrant laborers, its relentless drive to follow the retail trade wherever it went, its great concentrations of plants and people—violated the ambience in which luxury retailing thrives. It demands insulation from gross forms of work and workers, the symbols of wealth and good living and sidewalks inviting the stroll, the pause, the purchase.

A representative of the association summed it up.

The high-class retail business for which Fifth Avenue is so well known is the most sensitive and delicate organism imaginable, depending, first, on the exclusiveness of the neighborhood; second, on its nearness to the homes of the rich and the large hotels; and, third, on its lack of congestion, especially on the sidewalks, so that the customers may not be crowded or jammed in a hurlyburly crowd on their way to and from the different shops. . . . The loft buildings have already invaded the side streets with their hordes of factory employees. If an adequate move were made restricting the occupancy of the buildings so that no manufacturing could be done either on Fifth Avenue or from Madison Avenue over to Sixth Avenue, the matter would be solved. The employees from these loft buildings cannot be controlled. They spend their time—lunch hour and before business—on the avenue, congregating in crowds that are doing more than any other

thing to destroy the exclusiveness of Fifth Avenue. If the exclusiveness and desirability of Fifth Avenue are destroyed, the value of real estate on Fifth Avenue will depreciate immediately.⁴⁸

To handle all of these problems called for some means of dealing with the garment industry. It turned out to be the association's proposal that occupancy be restricted and that height controls be enacted for the avenue. Its theory was that if it could not get a flat prohibition against manufacturing operations, then at least if low enough limits were set they would discourage any further tall loft buildings where garment operations were typically conducted. They would also give the avenue the brightness of daylight by keeping down height.

The association showed in its pleas and demands its view of Fifth Avenue as a golden myth. Its counsel told the commissioners:

Fifth Avenue is probably the most important thoroughfare in this city, perhaps any city in the New World, and its reputation is world-wide, its history and associations rich in memories . . . It is not only the common property, but the common pride, of all citizens, rich and poor alike, their chief promenading avenue, and their principal shopping thoroughfare. Thus all alike are interested in maintaining the unique place that the avenue holds not only in the traditions of this city and in the imagination of its citizens, but in the minds of countless thousands and hundreds of thousands from other cities and countries who have at some time or other enjoyed the delights of this unique street.⁴⁹

He also quoted Cooke. "It is not too much to say that the very existence of the avenue, as New York residents have known it for many years, is threatened." ⁵⁰

Presumably this adoring multitude did not include those who were recently dispossessed from their Fifth Avenue mansions. Probably some of the less affluent did most of their shopping in Hester Street's Pig-Market. Nor is it clear just what era Cooke was actually referring to when he summoned the image of the "avenue as New York residents have known it for many years." In considerably less than a hundred years they saw the serious rows of brownstones rise and fall. Golden Madison Square had turned to tinsel. The *palazzi* were converted, demolished, or routed. The early twentieth century on the avenue was nothing if not great physical, social, and economic turbulence.

The fact is that the drive to get law onto Fifth Avenue was really not a

struggle to preserve a tradition at all. And it was something more than a fight to make money. If they could be called traditions, the eras of the avenue had come and gone in rapid waves. The retailer and many of the landowners were only the latest of Johnnies-come-lately. The struggle was actually about getting some kind of public control under which an urban tradition—this one happened to be the elegant shopping boulevard—might now begin with some assurance that it could continue.

Even if the association had wanted to put it that way, and there is not the slightest suggestion it did, it would have been strategically disastrous. Its entire case rested upon the repeated insistence that Fifth Avenue had special claims for preferred treatment. Some of the arguments clumsily made what seemed like a city-wide truth applicable to only one street. If the skyscraper aggravated living pressures and gloomy shadows increased the dangers of tuberculosis, these threats ought to have been controlled wherever they appeared. Yet sunlight on Fifth Avenue supposedly meant more to afternoon promenaders than to people walking through the canyons of the financial district. The latter were presumed to be too busy to think of it.⁵¹

The association's counsel told the Heights of Buildings Commission that if the association was correct that Fifth Avenue was "unique in its importance, its character, its charm, its associations, and in the place it holds in the hearts and minds of the people . . . it is suggested that legislation be enacted limiting the height of buildings in the Fifth Avenue district, regardless of whether the city-wide restriction is recommended or not."⁵²

The ultimate basis for this claim was the supposed longevity of the avenue's special character. Yet the unique thing about its entire existence was the remarkable rate of its exotic changes of life. How could such change be preserved?

The most obvious and least interesting thing to say about the retailers' motives is that they were essentially economic. But this is inadequate. The strategy to organize for financial success through public controls had a subtler aspect. It looked curiously like cultural growing pains, a shared mercantile disquiet about more than simply the financial implications of continuing to treat urban places like expendable playthings. In late childhood and adolescence comes the realization that some works of others are worth saving. Call it sentiment, a respect for craftsmanship, or the reassur-

ing tangible presence of the past, it comes down to the rightness of hanging onto a measure of stability during the swift changes which lead into adulthood.

Such concerns were certainly not foreign to planning. One sees a hint of this understanding in the statement Simon Brentano submitted as an association representative. It was the most temperate, the least dogmatic remark which came from that source. "The question of building heights limitation cannot be argued or advanced except in connection with the best and highest interests of the community, and it involves also the consideration and almost the necessity of adopting, as a first measure, a permanent city-plan commission . . ." Brentano also wanted to find out what the actual economic effects of height control would be and whether unrestricted heights in fact promoted or menaced community well-being. Of one thing he was certain, the information in the commission's hands demonstrated "that it is no longer a universal opinion that a building of unrestricted height is necessarily the final form of construction in the city of New York for the purpose of conveniencing the needs of modern life, or business, or that its relation to the economy of the city is such as it was but a short time ago believed to be by almost every one."⁵³

If most of the advice given to the commissioners came from business and real estate men and, to an impressive extent, architects, there were also spokesmen for government and civic organizations. Benjamin C. Marsh was among them. They emphasized those considerations of health which were tied to daylight, open space, and playgrounds. They were also apprehensive about the matter of fire control in tall buildings.⁵⁴

Whatever the source of the counsel, however local or city-wide the various proposals were, there was agreement that the city should at least establish some kind of height control if not the broader zoning scheme of regulating the use of land, building volume, and open space as well.

The objective of restraining or relocating the garment industry hardly looked like any of the sweeping thoughts coming from the early National Conferences on City Planning. Since the Fifth Avenue merchant and landowner were understandably and primarily interested in their commercial survival, there was no reason to expect them to originate some larger scheme for the planning of New York's future. Yet even the limited regulation they wanted to impose on the height of Fifth Avenue buildings carried a potential which legal controls, as well as things, have simply because they

exist. Like the technique of the steel-frame construction, or the elevator, the idea of controls invites use, and use raises the question of purpose.

For five years the National Conference had been encouraging the conviction that the purpose of height controls, like the zoning of which they were a part, ought to be found in a plan for city development. Like the hammer which gets its purpose from a blueprint, these regulations were supposed to be simply tools to realize a plan. Yet, with the rarest exceptions, there was no discussion or recognition of this in the views submitted to the New York City commission. On the contrary, what there was amounted to no more than a powerful demand or a very limited objective for one city street. In the absence of some kind of overall plan developed as broadly as possible, there were no shaping principles of urban growth and change.

As long as there was no standard of conduct, the speculative loft builder and the milling garment workers were neither better nor worse than the retail merchant or landowner on Fifth Avenue. In a lawless environment, questions of who is good and who is bad are beside the point. All the parties are merely struggling in the same game of surviving by any means. But the association and the forces for which it spoke wanted it both ways. They demanded that government both protect their interests yet curb equivalent conduct in the garment industry. To make their demands even more brazen, they wanted both results even if no other interest or sector of the city might enjoy the controls for which they were fighting. Such an attitude was as alien to the ground rules of social Darwinism as it was to the simple principle of using the same sauce for the goose and the gander.

The question of basic fairness seemed to bother no one except Ernst Freund. He spoke to it at the 1911 National Conference on City Planning. "It was said in the favor of the zoning power, 'What a pity it was that lower Fifth Avenue should have been given over to lofts or to factories!' Now, how could that ever have been prevented? The business came and the Fifth Avenue residents moved out. The lofts came in before the new movement was fully realized; now they are there, and to crowd them out would, it seems to me, cause injustice."⁵⁵

The 1913 Report saw the challenge as the association had described it. Factories and congestion had destroyed a shopping center and impaired real estate values on the lower portion of the avenue. "The problem is to preserve upper Fifth Avenue from a similar fate."⁵⁶ It recommended a

maximum height limitation of 125 feet, the recommendation of the predecessor Fifth Avenue Commission. But believing that height should bear some relation to street width, it tied this control to a factor of one and one-half times the street width. Factories would be excluded from upper Fifth Avenue.⁵⁷

As for lower Manhattan the need for regulation was urgent. The gist of the solution was to hold height to twice the street width but not less than one hundred or more than three hundred feet. Above that, the setback technique would apply. Every additional four feet in height would require a one-foot setback from the street wall. Despite the admitted urgency of the evil there, the commission felt bound to limit its proposed solution by "a proper regard for the business requirements and existing land values in this area of maximum congestion."⁵⁸ They were admittedly so liberal that they would have no effect in controlling building elsewhere in the city.

The report laid down a blue print for legislation which came three years later. Regulations should be city-wide. The different height and court regulations, and the land-use controls, should be applied in various districts established throughout the city. "The city should be divided into districts and the restrictions for each district worked out with reference to the peculiar needs and requirements of that particular district."⁵⁹ Height limitations would be tied to multiples of street widths with fixed absolute minimum and maximum limits subject to the setback technique. Every building might cover the entire lot up to the top of its first-floor story. Above that, 10 per cent of every interior lot had to be left vacant.

The setback regulations, which allowed unlimited height so long as the upper stories stepped back according to a formula, were also subject to another exception, the uninterrupted tower. A tower might rise to any height so long as it did not cover more than one-quarter of the lot and was at least twenty feet from lot and street lines. Even that twenty-foot limitation was waived if the building faced a public park or waterfront. As if they had Frank W. Woolworth in mind, the commissioners predicted that these towers, "while not attractive investments, will probably continue to be built as in the past from motives other than for rental return."⁶⁰

The practical effect of these proposals upon designs such as the Woolworth Building would often be negligible. As it was constructed, the actual setback on the Woolworth Building began at the twenty-seventh floor. Under the new regulations, it would have had to start at the twenty-third.

But the regulations would have permitted a tower occupying even more area than the one built.⁶¹ And, of course, they would have placed no limit on the height of the tower.

The Equitable Building, then still in the design stage, would have had its essentially slab shape design altered severely if the owners had insisted on retaining its height. By the time it reached half its height, it would have been interrupted by two setbacks, and its upper half would have been squeezed into a tower.⁶² The Flatiron Building would have had practically no change imposed upon the original design.⁶³

The overriding theory of the report was clear. The commissioners got it from the observable fact that a city divides itself into functional areas, "more or less clearly defined districts of different occupation, use and type of building construction. . . . The city is divided into building districts." This being the case, these "natural districts must be recognized in any complete and generally effective system of building restriction."⁶⁴ The report never defined "natural."

In context, no definition was necessary. It meant that which existed and little else. This was the announcement of nothing more than a reality quite exactly like the one Darwin described. Anything which survived was natural. Thus, in their time the meadow and marsh which underlay the Commissioners' Plan of 1811 were natural. "Millionaire's Row" was natural. So were the great department stores and hotels. Were the loft buildings any less natural? Or the festering ghettos of the lower East Side?

Like certain forms of neutrality, naturalness was a quality not everywhere the same. It was an inadequate term because it left no room for the garment industry. Yet the industry did exist, and it moved to Fifth Avenue according to a logic just as valid as the one which impelled the retail trade.

In view of the final shape of the report, it turned out that what was natural was defined by a scheme of values promoted by a tiny interest group in the city to which a much larger community acquiesced when the law was eventually passed in 1916. Put another way, the exhaustive factual material developed by the commissioners sometimes so militated in favor of certain regulations that it seemed to mock the very conclusions which were finally drawn, conclusions dominated by the commissioners' overriding concern for private real estate values.

Despite the report's recognition that there is some kind of relationship between health and light and air, there were actually no scientific stand-

ards upon which light and air controls might be shaped. The one topic for which the 1913 Report came closest to setting a semblance of standards was fire regulations. The careful calculations of lower Manhattan street and building capacity added up to a good deal more than the city's fire department could handle in a crisis. Given a catastrophe, the injuries or loss of life could have been shocking. And even if the assumption that many buildings would have to empty simultaneously was rather airy, the case for strict building controls in lower Manhattan was entitled to a good deal of statistical and emotional respect. Certainly, the need for height controls was much more compelling there than on Fifth Avenue if human safety was the main consideration.

But if protection of health and life was the purpose behind the projected controls, clearly it was not the highest purpose. Rather than announce its primacy in justifying zoning, the report cast it into such competition with property values that it seemed more like an afterthought than a competing concern. "Height and court restrictions should be framed with a view to securing to each district as much light, air, relief from congestion and safety from fire as is consistent with a proper regard for the most beneficial use of the land and as is practicable under existing conditions as to improvements and land values." ⁶⁵

The proposed height and area controls would establish what came to be called an envelope. It was an imaginary three-dimensional mold whose contours represented the maximum extent to which all city buildings might be developed under the regulations. Bassett used to visit a little back room at 113 Broadway daily where George B. Ford, architect and secretary to the commission, carved soap models of the possible envelopes of skyscrapers in an effort to visualize their height and setback possibilities.⁶⁶ The composite of possibilities for the skyscraper and every other city structure was the zoning envelope.

The design of the zoning envelope was the meat and drink of urban planning. It not only outlined the possible configuration of the cityscape, but, more important, by limiting the overall volume of building it could set limits on population density. The report sensed the magnitude of this concept and suggested a design criterion. A filled envelope should insure that "provision for light and air would be adequate, and the district as a whole would be appropriately improved." But in the next breath this criterion was conditioned by the ubiquitous concern for "safeguarding of

existing and future investments and the encouragement of an appropriate and orderly building development . . ." ⁶⁷ And, significantly, nothing was said about specific limits on population density.

Whatever values were to shape New York's future under zoning, the commissioners had proposed an immense order. If we pause for a moment and put it in the setting of Frederick Jackson Turner's estimation of the American character and Lincoln Steffens' revelation of its urban conduct, it appears to be not only immense but fantastic. To design these controls and reach their objectives meant that in some yet unspecified manner, decisions had to be made which would congeal into a minutely drawn scheme of urban development. Embedded in the scheme would be a vision of New York City which was sufficiently detailed, foresighted, composed, and enforceable to make this vast prescription possible. In short, there had to be what the commissioners called a "well considered plan." ⁶⁸

In fact, the report had begun to squint in that direction. After a study of land values, it proposed eight classes of height districts with specific areas of the city suggested for each. "It seemed that every portion of the city could be appropriately placed in some one of these eight classes without sacrificing existing values." ⁶⁹

Despite its businesslike sobriety and despite its frank admission that problem areas like the lower East Side were beyond at least immediate redemption, the report's underlying tone was deeply optimistic. But if zoning controls were to be the answer, they needed the sanction of law. That raised the question of power.

In modern American jurisprudence this question is resolved by examining practical consequences. If law is an eternal disembodied reality, a view drilled into many early twentieth-century lawyers by their nineteenth-century education, then such an inquiry is beside the point. Either power exists or it does not, whatever the consequences of its application. On this traditional view the lawyer's challenge is to discover it. But if law is regarded simply as a complicated work of man, then it is an invention and not a discovery. The report tried to blend both these attitudes. The effort turned out to be an intimation of a coming profound transformation of the American attitude and theory about the nature of law.

It could be argued that the kinds of controls the report proposed amounted to a governmental taking of private property by depriving an owner of his freedom to use and develop his property as he wished. If this

was their practical effect, it was clear that government would have to rely upon the power of eminent domain to enact the regulations. That meant it would have to compensate the owner for the property taken. The genuine fear of this result shaped the basic legal strategy of American zoning. The commissioners concluded that "practically, such a solution is out of the question. The expense and burden of condemnation proceedings and litigation in multitudinous cases would create a tax burden that would increase rather than compensate for the injury to property interests." ⁷⁰ Furthermore, they said, individual compensation was not justified, because the proposed restrictions would "conserve individual and public interests and rights. They subject the use of urban land to such restrictions as are appropriate and reasonable in the nature and history of this class of property." ⁷¹

Based on what we have seen of the nature and history of the class of property about to be affected, it is fair to ask just what individual and public interests and rights were being conserved. Whatever they were, the law offered an answer which would apparently cost nothing, the police power.

The great burden of the commissioners' work was proving the accuracy of that conclusion of law.

Before the commissioners proved it, Bassett and Purdy had to prove it to their colleagues. Bassett hit upon the idea of taking them to Boston to review its height control regulations. The Supreme Court of the United States had reviewed those regulations in *Welch v. Swasey* ⁷² in 1909. The news of its holding that the police power could constitutionally be used to enact such controls was a bit of nicely timed drama for the First National Conference on City Planning, convened immediately after the decision came down.

The commission was impressed by what it learned in Boston. Purdy wrote that Bassett had to leave early. The rest of the commissioners returned on the Fall River Boat. "As Vice-Chairman, I called them together in a meeting aboard the boat, and I got them, still very much impressed by what they had learned in Boston, to almost unanimously adopt a resolution that they thought that zoning was a lawful use of the police power. With this accomplished, the first part of our job was done—we had sought the answer to our question of what to do and we had decided that the answer was Zoning." ⁷³

Legal advocacy is an art, but an art of settled rules. The commissioners respected them, and history vindicated their conclusion. It would there-

fore be idle to argue with their success. But that does not foreclose the question of how they constructed it. It was raised with skill enough, but it was indeed a wobbly edifice because the facts were singularly weak. Such strength as it got, it got not from facts but from a policy argument, city planning.

Beginning in 1827 with a seminal Supreme Court decision and opinion written by Chief Justice Marshall,⁷⁴ American courts had laid down a line of constitutional cases which picked out the limits and objects of the police power. As constitutional theory had it, when the Union was formed the states had the inherent power and the reserved power to pass laws for the health, safety, order, and general welfare of their communities. Marshall had said that it was a power "which unquestionably remains, and ought to remain, with the states."⁷⁵

Whether they got it at birth or had it reserved to them by the federal Constitution, the states had to use the police power subject to the limitations of the Fourteenth Amendment of the federal Constitution. This amendment (ratified 1868) prohibits the states from depriving persons of their life, liberty, or property without due process of law.

The final arbiter of what is or is not such a deprivation is the Supreme Court of the United States. Until 1926 it had never spoken on the crucial question of whether the police power was available to enact zoning, or whether zoning was that kind of deprivation of property which the Fourteenth Amendment prohibited. Lawyers' worries are made of such abstract concerns, and so it was that Bassett especially was preoccupied with the large and novel step New York City was about to attempt.

Welch v. Swasey, in which the Supreme Court upheld Boston's height controls, was comforting. But while his concern did not show through the report, it is inconceivable that Bassett and the others with legal training were ignorant of the Supreme Court's shrunken view of the police power early in the century as expressed in cases like *Lochner v. New York*.

The orthodox constitutional dogma announced that reasonableness was the rule by which police power measures should be tested. If there was a reasonable relationship between the police power regulation and the health, safety, order, or general welfare of the community, then the regulation ought to be upheld. The 1913 Report was the first great effort to prove that zoning made the vital connection.

Neither the first nor the last public body to rely on such learned authority, the commissioners turned to the work of Professor Ernst Freund to set

the stage. From its study of American case law his *Police Power* (1904) disclosed that the power changed with changing conditions. It was "elastic, i.e. capable of development."⁷⁶ Upon this truth they made the doctrine a work of man. "If an informed and deliberate public opinion becomes educated to the necessity for the exercise of greater control over the planning and over the building of the city, and that such control cannot be effectively exercised except through the police power, it is clear that the police power is sufficiently elastic to meet the situation."⁷⁷

To Freund they also turned for an important group of concepts.⁷⁸ Public health, safety, and order were the primary or narrower terms. General welfare was a broader one, and one which the courts would look at more closely. If, then, it turned out that the first group offered little help in establishing the connection between the power and the reasonableness of its ends, the broader concept of general welfare might salvage the case for zoning controls. But an argument had to be raised to demonstrate it. City planning was that argument.

Fifth Avenue interests could fairly be called "informed and deliberate public opinion," however narrow their desires. They had also been educated, but on nothing like the scale of which the commissioners wrote. Yet if their demands for Fifth Avenue could be stretched to be called a demand for greater public control over city planning and building, then the rest of the fight might be won, for the commissioners had ruled out eminent domain as an alternative. While the expressions of public opinion to the commission certainly included more than this group—there were the skyscraper and civic reform interests—the nub of what they had all agreed upon was little more than height controls. As a body, the commission's informants certainly made no general demand for the whole group of zoning controls, and those who did typically tied it to a demand for city planning.

Fifth Avenue really offered no facts which justified exercising the police power for reasons of health, safety, or the generally accepted meaning of the term order. Unlike the lower Manhattan skyscraper area, whatever street congestion existed did not tie the hands of the fire department. No one was bold enough to suggest otherwise. Objections to the congestion had always been posed in terms of shopping amenity and the related harm to the retail trade, essentially a private point of view. Despite its occasional resort to the light and air arguments for the avenue, the actual material on which the report was supposed to rest its recommendations turned out to

be so sketchy that it was no more than a makeweight. The balance of the appeal to Fifth Avenue's case was simply a plea to protect the warm memory of a street which never existed, but which, if it had, was also not then the proper object of the police power.

The fact is that such substantial claims as were made on behalf of health, safety, and order were tied only to the lower Manhattan situation. If the threatened loss of light and air and the potential for fire catastrophe were all that the report warned about, it is stunningly obvious that the way to deal with these harmful events was to stop them—prohibit the further construction of the offending skyscrapers in that area. The report made no such proposal. Yet that is exactly what it did recommend for Fifth Avenue, where none of these threats existed.

By whatever rhetoric the report used, there is no sharper illustration of its preference for financial values over other values than in this set of views. It was more important to defend the carriage trade by removing the garment industry than to protect life by being able to evacuate office workers from burning buildings in the financial district. If this judgment is erroneous, the flaw lies not in the comparison between the final recommendations, but in the embarrassing fact that the conditions in lower Manhattan were really not so bad as the report proclaimed.

It said very little about the residential areas of New York City except for the lower East Side. That was hopeless. Yet despite its great preoccupation with Fifth Avenue and lower Manhattan, it thought that the clearest example of the need for zoning was in the residential suburb.

Here real estate developers have often found it profitable to secure control of large areas in order by restrictive covenants to insure to intending purchasers of homes the creation and maintenance of a residence section of a certain desired type. The surroundings and neighborhood are all important in securing desirable home conditions. Unless the general character of the section is fixed for a considerable period of years no one can afford to build a home. If he does build, a change in the supposed character of the neighborhood through the building of apartments, stores or factories may render the location undesirable for a home of the character he has built and thus greatly depreciate his investment.⁷⁹

Reasonableness was the constitutional touchstone for the police power. It also applied in the constitutional requirement for equal protection of the laws. Here the basic apparatus of zoning was at stake, the scheme of

having different regulations for different areas of a city. The report candidly recognizes the impossibility of arguing that since light, air, and comfort were more important for suburban dwellers than for workers in the canyons of lower Manhattan, suburban areas were entitled to stricter controls over building. "It seems, however, that such districting can be justified if it can be shown to be essential to the general welfare. If regulations admittedly appropriate and reasonable for suburban areas are admittedly inappropriate and unreasonable for congested areas, the public importance and necessity for districting are clearly shown." ⁸⁰ "Admittedly" was an assumed conclusion.

Years later, Bassett seemed to justify these differences in terms of the traditional pattern of cities, denser at the core than at the suburbs, and the varying desires of people to live near one or the other.⁸¹ In 1913 the report put it on a different footing. It urged that while any given district's regulations might seem to have no reasonable connection to the purposes of the police power, "yet when taken as a part of a comprehensive plan for the control of building development throughout the entire city, its relation to such purposes may be unmistakable." ⁸² What the commissioners meant by "comprehensive plan" they never said. Despite the German origins of zoning in a planning setting, despite the developing litany of planning-zoning at the new National Conferences on City Planning, and despite some of the commissioners' sensitivity to the connections between the two, it may fairly be inferred that they meant no more than a scheme in which all of the city's land and buildings would be placed under district controls. There was no suggestion of the process of decision through which these regulations would be hammered out to give the city its coming shape or of how they might affect the character of its coming life. Yet planning was to be zoning's ultimate legal defense and social justification.

However nebulous the comprehensive plan was, its child, zoning, was full of great expectations. Skill and foresight, they said, would determine the health, and comfort and welfare of the people. "This means increased productivity and increased productivity means higher wages for the laborer, higher profits for the employers and higher rents for the real estate owner." ⁸³ Everybody would profit.

Precisely one year after creation of the 1913 Commission the New York State Legislature received a bill to amend the city's charter to give it the power to zone. Two months later the bill was law. Lawson Purdy recalled that it passed with ease since it had city sponsorship and was nonpolitical.¹ During the next two years this grant of police power was fashioned into the pioneering 1916 Resolution. Events were now moving so swiftly that the city had begun to shed its first generation of steel-frame structures. The Tower Building was marked for demolition.²

With Mayor Mitchel's new reform administration in control of the Board of Estimate, McAneny submitted a resolution establishing a second commission to be known as the Commission on Building Districts and Restrictions. The new body was appointed in June 1914. Bassett and Purdy received the same posts—chairman and vice-chairman—that they had held on the 1913 Commission. While some of the old members were missing, notably Veiller, the make-up of interests was essentially the same as it had been in 1913.³

The new commission relied upon the 1913 Report for much of its data. The unique goal of its work was to draft the tremendous number of technical details necessary to implement the zoning and at the same time to create a political climate in which it would be favorably received. In both tasks the commission kept very close touch with the community. The staff examined all of the land in New York. The commissioners, especially Bassett, attended innumerable meetings of local groups in an effort to amass support and dampen hostility.⁴

The specter of unconstitutionality haunted the commission's work as it had the first commission's. The 1914 enabling legislation did not calm the

doubts of some gifted lawyers who believed that the whole effort was unconstitutional. They felt that only an amendment to the state constitution would cure the difficulty. As it happened, a New York constitutional convention was in session in 1915. Purdy became the key figure in a scheme to scotch this crucial objection. First he tried to get the convention's chairman, the noted lawyer, Elihu Root, to support an effort to add a zoning amendment to the state constitution. Root refused. Then came an alternative request. Root agreed simply to recognize Judge Morgan O'Brien, who, like Root, was also a member of the convention. A motion to insert a zoning provision in the constitution was before the convention. Keeping his promise to Purdy, Root recognized O'Brien, who delivered an opinion in which he assured the body that the amendment was unnecessary since legal authority to zone already existed.⁵

This was a strategy of authoritative passivity. Out in the business community another strategy—unofficial activity—was developing. It was less subtle but concerned with a much more practical problem, how to get the city to cease studying and begin acting.

The Fifth Avenue merchants were the most restless and impatient group in the city. Unlike Bassett, who saw no villains in the turbulent situation, Robert Grier Cooke rarely lost an opportunity to indict the garment industry. By 1914 the Fifth Avenue Association had only the partial success of the recommendations embodied in the 1913 Report. There was still no legislation. For the next two years the association pressed hard for it. It also broadened its campaign by calling for the enforcement of laws already on the books, notably the 1914 factory occupancy regulations which came out of the Triangle fire. Using the result of the association's "secretly conducted" ⁶ investigation, Cooke predicted that the new factory controls would force such a large reduction in the number of workers that much of the garment industry would prefer to move elsewhere rather than comply.

In addition, the association argued for an amendment to the new factory laws. It wanted to abolish a provision which allowed an increase of worker occupancy where automatic sprinklers were installed. This led to a brief, biting interchange between the editor of *Safety Engineering* and the association's investigator, in which the former wondered rhetorically whether the Fifth Avenue group was "more interested in the safety of factory workers or in the safety of Fifth Avenue realty" ⁷ and the latter assured the world that the association had nothing against sprinklers but simply thought there would be panic before they worked.⁸

If manufacturers were beginning to leave under the pressure of the occupancy laws, others continued to arrive. But they did not bother Cooke, since most of their workers were women. Supposedly the women did not loiter on the streets during the lunch hour.⁹ To handle those employees who did crowd the avenue, one group hit upon the idea of getting the merchants to support a brass band in Madison Square,¹⁰ presumably on the theory that what was beyond the law to compel might be within the power of art to attract.

The second commission worked for two years. The culmination of its efforts was a group of hearings on its temporary report. These ran from March through May 1916, and on June 2, 1916, the commission published its final report.¹¹ Nowhere in the nearly three hundred tightly printed pages of that very intricate document is there anything like an adequate account of the circumstances in which it was born. George B. Ford, architectural staff member and consultant to the two commissions, described the circumstances as "Perhaps the most remarkable justification of city planning that has ever appeared in this country."¹²

Despite the Fifth Avenue Association's anguish over the fate of the street, the situation did not improve. Indulged or encouraged by the city government, the association busied itself with a "Vigilance Committee" to discourage fraudulent and tasteless advertising along the avenue. It also lobbied for bans on parades during business hours.¹³ But its central interest was to turn zoning into law. While it was issuing sanguine statements during the spring of 1915 about the favorable effects of the factory laws and the proven financial failure of the skyscraper,¹⁴ a new approach appeared. It began that spring as the casual talk of shopkeepers: organize a boycott against those garment manufacturers whose workers were crowding the sidewalks. The earliest suggestions proposed getting the workers off the streets by having their employers provide on-premises lunch facilities. Nothing came of these ideas.

By early 1916 the sidewalk congestion was moving north toward Thirty-fourth Street. New lofts had recently been built along the side streets in that area.¹⁵ What had been offhand suggestions during 1915 now firmed into a specific, decisively important campaign in the new year.

Late in January 1916 the association conducted a strikingly successful membership drive. At one of its recurrent Delmonico's luncheons, the controller of the Metropolitan Life Insurance Company, the city's largest source of construction loans, announced that the Metropolitan would no

longer lend funds to any loft builders operating above Thirty-fourth Street. Along with other large lenders, it had apparently adopted the policy some months before.¹⁶

The city's chief magistrate also offered comforting words plus the power of his judicial office. Slicing his way through his analogy that Fifth Avenue was like a string of sausages with some good and some bad links (Fourteenth to Thirty-fourth bad), he assured the association that "it is perfectly lawful to push an obstructionist aside . . . [if he] blocks the way . . . I am ready at all times to do my part in keeping Fifth Avenue respectable." B. Altman's president summed up the situation, not in terms of respectability, but as the beneficent displacement of homes by businesses and the stupendous loss of land values which resulted when business was neglected.¹⁷

The merchants set a three-pronged strategy. They decided to cut off loft building funds, get zoning enacted, and impose a drastic boycott. The *New York Times* commended the plan in an editorial headed "The Invasion of Fifth Avenue."¹⁸ One man turned it all into a stunning triumph, J. Howes Burton.

In February 1916 the association elected Burton to its board. During the January membership drive, he stimulated further boycott talk. "To protect its own interests the Fifth Avenue Association feels that something must now be done with a punch in it."¹⁹ He had a substantial stake in finding an effective solution. His cotton goods firm had just completed a new building at Fifth Avenue and Twenty-ninth Street, and he and his brother also owned the Fifth Avenue site on which Lord & Taylor had opened their department store.

On March 5 and 6 all of the city's newspapers ran a full-page advertisement carrying the banner head "Shall We Save New York?" (Fig. 74). It appeared over Burton's name as chairman of the Save New York Committee. He was later described as the successful "King Canute of the situation."²⁰ Just before launching his conquering forces, he was discreet enough to get the advice of counsel. Fortified with their opinion that the boycott would not be an illegal restraint of trade, he set sail.

The first stop was the inevitable luncheon at Delmonico's. There he invited representatives of Fifth Avenue retail establishments, but instead of haranguing them with what was by now the stale rhetoric of warfare, he gave them animal husbandry. Indifferent to the digestive consequences, he admonished his guests:

SHALL WE SAVE NEW YORK?

A Vital Question To Every One Who Has Pride In This Great City

SHALL we save New York from what? Shall we save it from unnatural and unnecessary crowding, from depopulated sections, from being a city unbecomingly, from high rents, from excessive and illy distributed taxation? We can save it from all of these, so far at least as they are caused by one specified industrial evil—the erection of factories in the residential and famous retail section.

The Factory Invasion of the Shopping District

The factories making clothing, cloaks, suits, furs, petticoats, etc., have forced the large stores from one section and followed them to a new one, depleting it of its normal residents and filling it with big loft buildings displacing homes.

The fate of the sections down town now threatens the fine residential and shopping district of Fifth Avenue, Broadway, upper Sixth and Madison Avenues and the cross streets. It requires concentrated co-operative action to stem this invading tide. The evil is constantly increasing; it is growing more serious and more difficult to handle. It needs instant action.

The Trail of Vacant Buildings

Shall the finest retail and residential sections in the world, from Thirty-third Street north, become blighted the way the old parts of New York have been?

The lower wholesale and retail districts are deserted, and there is now enough vacant space to accommodate many times over the manufacturing plants of the city. *If new modern factory buildings are required, why not encourage the erection of such structures in that section instead of erecting factory buildings in the midst of our homes and fine retail sections.*

How it Affects the City and its Citizens

It is impossible to have a city beautiful, comfortable or safe under such conditions. The unnatural congestion sacrifices fine residence blocks for factories, which remain for a time and then move on to devastate or depreciate another section, leaving ugly scars of blocks of empty buildings unused by business and unadapted for residence: thus unsettling real estate values.

How it Affects the Tax-payer

Every man in the city pays taxes either as owner or tenant. The wide area of vacant or depreciated property in the lower middle part of town means reduced taxes, leaving a deficit made up by extra assessment on other sections. Taxes have grown to startling figures and this affects all interests.

The Need of Co-operative Action

In order that the impending menace to all interests may be checked and to prevent a destruction similar to that which has occurred below Twenty-third Street:

*We ask the co-operation of the various garment associations.
We ask the co-operation of the associations of organized labor.
We ask the co-operation of every financial interest.
We ask the co-operation of every man who owns a home or rents an apartment.
We ask the co-operation of every man and woman in New York who has pride in the future development of this great city.*

NOTICE TO ALL INTERESTED

In view of the facts herein set forth we wish to give publicity to the following notice:—We, the undersigned merchants and such others as may later join with us, will give the preference in our purchases of suits, cloaks, furs, clothing, petticoats, etc., to firms whose manufacturing plants are located outside of a zone bounded by the upper side of Thirty-third Street, Fifty-ninth Street, Third and Seventh Avenues, also including thirty-second and thirty-third Streets, from Sixth to Seventh Avenues.

February 1st, 1917, is the time that this notice goes into effect, so as to enable manufacturers now located in this zone to secure other quarters. Consideration will be given to those firms that remove their plants from this zone. This plan will ultimately be for the benefit of the different manufacturers in the above mentioned lines, as among other reasons they will have the benefit of lower rentals.

R. ALTMAN & CO.
ARNOLD, CONSTABLE & CO.
BEST & CO.
BONWIT TELLER & CO.

J. M. GIDDING & CO.
CIMBEL BROTHERS
L. F. HOLLANDER & CO.

LORD & TAYLOR
JAMES McCREERY & CO.
R. H. MACY & CO.

FRANKLIN SIMON & CO.
SAXS & CO.
STERN BROTHERS

The undersigned endorse this movement for the benefit of the City of New York

Vincent Astor
University Club
Union League Club
Crispian Club
Rita Carlton
Hotel Biltmore
Hotel McAlpine
A. A. Vassilie & Co.
Mack Cross Co.

Astor Estate
Waldorf Astoria
St. Regis Hotel
Hotel Carlton
Hotel Belmont
Hotel Manhattan
Hotel Netherlands
Hotel Lorraine
Charles Thierley

Astor Trust Co.
Columbia Trust Co.
Fifth Avenue Bank
Guaranty Trust Co.
Maritime National Bank
N. Keweenaw & Co.
H. W. Johnson-McNeill Co.
Tale & Torrey Mfg. Co.
Scott & Fowler Co.

Tiffany & Co.
Corbin Co.
Black, Starr & Frost
Thompson & Co.
Harris & Co.
E. M. Gault & Co.
Charles Seftman's Sons
Mallory's

W. & J. Sloane
Austrian Company
C. C. Goodhue, Sons
A. Juchacz & Co.
Tiffany Studios
Higgins & Selzer
Davis, Collamore & Co.
The Edison Shop.
Frank L. Shumager

Brooks Brothers
Kane Hat Co.
Thos. Helmsletter & Co.
Joann McCutcheon & Co.
Cassmeyer
J. & J. Slater, Inc.
De Ponce
Kensley & Company
Fred's Koppel & Co.

We ask Citizens, Merchants and Civic bodies to co-operate and send letters endorsing this plan to the committee, care of J. H. Burton, chairman, 267 Fifth Avenue.

74. The New York Times advertisement which ran on March 5 and 6, 1916.
THE NEW YORK TIMES.

Gentlemen, you are like cattle in a pasture, and the needle trade workers are the flies that follow you from one pasture to another, nagging you into abandoning one great centre after another and leaving a trail of ruin, devastation, and bankruptcy up and down the length of the city. The rich pasture of your predecessors was in Grand Street. The flies drove the trade to Fourteenth Street, where most of you took up the burden of trying to do business against these odds of a city that had no law and no

plan to save itself from the spoliation of its choicest selections. Then you were driven to Twenty-third Street, and again, within a few years, to Thirty-fourth and Forty-second Streets, and here, once more, the flies are threatening to swarm worse than ever.²¹

The fly-bitten committee sprang to life. Each of its members swiftly subscribed from five thousand to fifteen thousand dollars to finance salvation. With funds in hand, the next step was conducting what Burton euphemistically called "an educational campaign."²² The advertisement was the first lesson.

It would be difficult to invent an episode in the life of an American legal institution more representative of some of the major tendencies of its culture. The central message was vintage Spencer. Root, hog, or die—either the garment industry had to get out of the area north of Thirty-fourth Street or its organized, powerful customers would destroy it. The message was charged with enormous promise blended of the shimmering vision of a "city beautiful" and real estate values. It was delivered in a setting in which "naturalness" was ultimately equated with muscularity. What the garment industry had done was "unnatural." The "instant action" which the Fifth Avenue merchant demanded amounted to obedience to a command of evolution.

The equating of New York with the high-class retailing district was not very different from the formulation in the 1913 Report. The heart of the city, the specific which made the generalization, was the area bounded by Third and Fifth Avenues from Thirty-third to Fifty-ninth. In an effort to stress the breadth of the project's importance, Burton wrote that if it had been "confined entirely to Fifth Avenue there might have been distrust of the motives of those who started it. But the establishment of a great zone was different. This affected the very heart of New York, and comprised all that makes the city worth while as a place to shop, play, work and live in. Special interests were thus abolished, and the movement put above suspicion."²³

The boycott stick and the relocation carrot worked extraordinarily well. They brought an almost embarrassingly swift capitulation from the garment industry and an outpouring of civic virtue which would have fired the soul of Periclean Athens as it did the Save New York Committee. On the first day of the advertisement's publication, Burton affirmed the depth of pride the cloak and suiters had in the future of New York. He said they wondered: "Why wasn't it started before?" The whole movement, he

added, was born of sentiment. New Yorkers wanted to save the "Fifth Avenue that is renowned wherever men travel or talk of their travels."²⁴

Unbounded economics also had something to do with the movement. Burton said that the real estate between Thirty-third and Fifty-ninth Streets was "the most valuable in the world and for the benefit of the City of New York values there must not only be preserved, but they must be allowed to enhance, which they will to an unlimited amount if factory buildings are not allowed to be built there."²⁵ In the midst of the campaign Burton filed a statement with the 1916 Commission in which he acknowledged the importance of business and real estate values in the "basic idea"²⁶ behind the movement.

To sustain the glow of manufacturers' civic pride, the Save New York Committee established a permanent headquarters on Fifth Avenue. There, it announced, it would keep permanent lists of all garment operators north of Thirty-fourth Street. As a further service, it offered to furnish real estate brokers with the names of manufacturers willing to move. It systematically canvassed the area in an effort to hasten the departures. Manufacturers who signed the pledge became members of Burton's committee. They were exempted from the boycott and permitted to stay in the area until their leases expired. The city's lending institutions agreed to discourage loans on those new buildings in the area which violated the committee's objectives. In less than a year, the committee was sending out appeals to fifteen thousand retail merchants throughout the nation to endorse the campaign.²⁷

Several weeks after the publication of the advertisement, the committee took another full page in the city's newspapers. It carried the pledging signatures of nearly 75 per cent of the members of the Cloak, Suit and Skirt Manufacturers' Association. Bursting with appreciation, it acknowledged that "The people of New York owe a debt of gratitude to the [pledging] . . . firms, whose public-spirited stand ensures the success of this great civic movement."²⁸ The *Times* agreed editorially. "These manufacturers have seen the light, and their response to the appeal is evidence of their public spirit." What was needed, it said, was foresight to build Manhattan successfully. "The movement to 'Save the City' was well named. Its condition had become perilous, but it is now in the way to be saved."²⁹

By midsummer 1916, 95 per cent of the manufacturers affected by the boycott were willing to move.³⁰ The Save New York movement wound up the last stages of zoning's gestation. It had forced the 1916 Commission

to end its ruminations and bring out a proposal. The shape of it began to appear as the Burton committee was harvesting its results. A lead editorial in the *Times* stated that Burton's movement was "the best possible introduction and recommendation" for an interim report of the commission. "In brief, these objects are to confirm the possession of certain districts for certain uses, the fitness of each to the other being a demonstration through the process of free and natural selection."³¹

To say the most generous thing it could about the emergent zoning law, the *Times* assured its readers that "The plan is practical, not ideal. That is to say it recognizes existing conditions, does not require the removal of inappropriate buildings and uses, does not seek to restore depressed districts, and, in a word, does not sacrifice vested rights—or wrongs rather, of the individual for the creation of the City Beautiful, or even of districts." Yet in its promise to stop the destructive height rises it had "a message of hope."³² An article in *The Survey* saw it in the same light, adding that while the tentative zoning proposal in March 1916 was not a plan for the city's physical development, it was important as a first step in that direction.³³

Considering the planning framework within which zoning had but recently arrived in the United States, it may seem remarkable that it fell away so rapidly. Yet its early disappearance was not unusual if we recall that the first American sponsorship of the planning idea came from an extremely small group of reform types whose power in the community bore little relation to the strength of its thinking. When the spirit and grand aims of the new planning movement came to be translated into law, they took the impress of whatever groups were politically competent enough to force the legislation.

What the new zoning law promised was actually less than Burton's committee was accomplishing by private action. His group was dramatically restoring the *status quo ante bellum*, getting rid of the venturesome garment industry. Rather than perform this unscrambling operation, the new law would merely confirm the conditions that merchant and manufacturer had created on Fifth Avenue. Thus, at the very outset zoning's control over urban development was essentially a holding operation rather than an apparatus for resolving such problems as chaotic land uses or implementing plans for future development. The contrary notion of equipping municipal government with the kind of planning power found in many German cities was so alien to the traditions of American municipal law

(let alone politics) that even the contemplation of a first effort like zoning plunged its civic-minded draftsmen into anxiety over its constitutionality. Much of their worry turned out to be fear, not of reforming change, but of stasis.

During the spring of 1916 the Commission on Building Districts and Restrictions conducted hearings throughout the city. So successful was the combination of Bassett working in the neighborhoods and the large mercantile, banking, and real estate groups thundering in the commercial core, that there was virtually no opposition. Instead, groups like the Fifth Avenue Association were enthusiastic, especially given the assurances that not only were England and Canada adopting zoning, but that no city in Germany had ever suggested the abolition of zoning once it had installed the controls.³⁴

On July 25, 1916, zoning became law by a vote of fifteen to one. The *Times* classed the lone dissenter with the reluctant 5 per cent of the garment industry who declined to pledge for salvation. Those who did sign "put their names upon a roll of honor . . ." ³⁵ The head on an editorial which praised the new legislation was "Insuring the City's Future." ³⁶

The zoning institution was finally born because of the Spencerian conduct of the Burton committee. If this conclusion is not irresistible, the economic strength of its members, the magnitude of its show of force, and the timing of events make it at the least overwhelming. On the day the first Save New York advertisement appeared, Burton revealed his appreciation of the prospect for ending the study stage and getting the new law passed. "All red tape has been cut with one stroke," he said. "The zoning commission in the future will have no difficulty in carrying out its plans." ³⁷

Yet Burton declined the deserved tribute which others had given his committee. In a letter published several months after passage of the resolution, he wrote: "We wish that we could claim the credit for this law, but . . . we believe that the zoning law was the result of the work principally of George McAneny and the other members of the Board of Estimate and Apportionment, of which he was a member, and to Lawson Purdy, President of the Tax Board, and to these gentlemen and their associates the entire credit for the passing of this law is due." ³⁸ The only credit he would accept was for the role he had played in shaping public opinion and helping to accomplish what the zoning bill intended, moving the garment industry off Fifth Avenue. Yet the threatened boycott clearly dramatized

the might of economic leverage on the situation. It was just the organization of such forces which had begun the drive for zoning several years earlier in a parlor of the Fifth Avenue Hotel.

At some point in the legislative process as well as in larger processes of decision making, what is needed beyond anything else is a burst of effective frustration. That was the contribution of Burton's committee.

The most unusual thing about the new law was the passionate optimism with which it was received, not only locally, but throughout the nation. This spirit swept far beyond the young planning profession and the business community. McAneny called the law "the greatest single achievement in city planning in America," and "the greatest thing New York City . . . has ever done . . ." ³⁹ For *World's Work* it opened "a new era in urban civilization." ⁴⁰ *Outlook* hailed it as "one of the most progressive and forward-looking steps for the protection of its future development that has been made by any American city." ⁴¹ Veiller, the hard-bitten, rather cynical reformer, said: "The situation as I see it is the most hopeful one the city planning group has ever had to face. I repeat, we are standing on the edge of a great change in living conditions in America. We are going to revolutionize conditions in a generation . . ." ⁴²

The intoxicating promise of a long leap along the high road of progress often turns into something else once the details begin to close in. It is one thing to forecast the New Jerusalem, another to lay the bricks. The 1916 Report found the golden prospect of a finer urban life riddled with practical, utopia-denying complications.

In building a city it is sometimes assumed that we should start with a certain model type of residence and seek to make that type universal. If a density of not exceeding eight families to the acre is desirable, building regulations should be devised to prevent a greater density. The problem is not so simple. The problem of housing accommodations and desirable densities cannot be profitably considered without reference to a particular city, with a known topographic, transit, commercial and social organization and an assumed probable rate of increase in population. We cannot annihilate time and space, and as long as these factors are appreciable the problem of the appropriate intensity of the use of land must always remain relative. There can be no absolute standard.⁴³

The standards, then, were to be relative. Where land had been improved, the standards (if that is what they were) would be set by developments already in being. Thus, stuck with what had happened, the design theory

of zoning was created to confirm what had already occurred while controlling development that would one day come. The only hopeful part of the new institution was therefore completely locked up in the future rather than in a redoing of the present.

In direct contrast with other legal institutions built up by the police power—factory regulations, health codes, and tenement controls, for example—zoning was not intended to cure difficulties which existed when the institution was born. These difficulties typically appeared in existing land uses which conflicted with the use classification imposed upon a zoning district. The prototype of this problem was the factory or shop in a district classified as residential. Such cases were called nonconforming uses.

When the new factory occupancy laws went into effect, employers had to reduce shop occupancy, add fire exits, install sprinklers. But despite the fact that the Fifth Avenue situation helped bring zoning to the United States, paradoxically zoning was not going to remove the garment industry already there. Only a private Save New York movement could do that. And yet in 1915, the Supreme Court of the United States held that the police power was available to stop nonconforming uses, to deal retroactively with uses incompatible with those allowed by law. Announcing in *Hada-check v. Sebastian* that “There must be progress, and if in its march private interests are in the way they must yield to the good of the community,”⁴⁴ the court sustained a Los Angeles pre-zoning ordinance under which brick kilns were barred from residential districts. At great financial loss to the brick maker, the city ousted him from premises on which he baked bricks and extracted clay. He was allowed to continue taking out the clay, but forced to burn bricks elsewhere. The decision was extraordinary for its time, and yet throughout zoning’s entire history American cities have let this great power lie virtually unused.

Bassett explained it. In the years preparatory to New York’s adopting a zoning law, property owners feared that uses which became nonconforming as a result of the passage of the new law would be forced to cease. They demanded that this should not be the effect of the law. The commissioners assured them that it would not be. Zoning, they said, “looked to the future, and . . . if orderliness could be brought about in the future the nonconforming buildings would to a considerable extent be changed by natural causes as time went on. It was also stated by the Commission that the purpose of zoning was to stabilize and protect lawful investment and

not to injure assessed valuations or existing uses. This has always been the view in New York.”⁴⁵ One might add, and throughout the United States as well.

While it appeared at a time of great national turbulence and change, and while one of its two essential sponsoring groups was the municipal reformers, zoning's first objective was to solidify a very particular *status quo*. All of the city was divided into zoning districts on a set of maps which, like the text of the zoning regulations, had the force of law. In theory each district was a vehicle within which a fragment of the future was to be shaped. Also in theory, city planning was to compose these fragments into an overall scheme. But except for raw, unimproved land, in greatest measure the perimeter of each district was ultimately fixed by the shape of things in being. Upon this seemingly frozen bottom was raised the classic zoning formula of use, height, and area districts. Their organizing principle—a good deal more Germanic than American—was a concept of hierarchy, a kind of fixed, developmental pecking order for every square inch of city land and every cubic foot of city building. It was all summed up in the homely phrase, “A place for everything and everything in its place,” a bold maxim indeed for a nation whose early twentieth-century urban patterns everywhere denied good municipal housekeeping.

At the apex of the use pyramid was the residence. In districts where residential uses were permitted, business and industry were excluded. In the business use district, the residence might be allowed but industrial uses were barred. At the bottom was the unrestricted district where buildings might be used for any purpose.⁴⁶ A great deal of American zoning law, both legislative and judicial, developed around the seemingly endless collisions between property owners and city governments over how to classify specific uses within this system.

In the height districts there was literally a hierarchy. The resolution and maps established five classes. They ranged from those in New York's outlying areas in which a building could rise no higher than the width of its street to those which might be built to two and a half times the width of the street with additional heights if the upper stories were set back. The area of maximum permissible height was in the existing skyscraper district of lower Manhattan.⁴⁷

There were several classes of area districts. They ranged from those imposing the strictest control over yards, courts, and other open spaces surrounding a building (generally for detached or semi-detached houses)

to those demanding very little unoccupied space. The latter were typically in the warehouse sections along the river fronts and near rail terminals.⁴⁸

The final feature of the 1916 Resolution was intended to save this unusually elaborate system of controls from Draconian, legally fatal rigidities. Where the strict letter of the new law might cause unnecessary hardship an appointed administrative body usually known as a Board of Appeals or Board of Adjustment was empowered to grant relief.⁴⁹

If the property owner failed in his appeal to the board, he could then seek relief in the courts. This standard provision of zoning law was to become one of the most vexing features of the whole apparatus. Originally intended as a safety valve, its metaphorical function quickly became the leak in the dike through which some characteristic American traits began to seep.

The 1916 Commission wound up much of its work by making specific applications of these regulations. What areas of New York were to be mapped for residential use? Where could a two-and-a-half times building be erected? How much court and yard space would a builder have to provide for the structure he proposed to put on the undeveloped ground he owned? The answers to such questions lay in the zoning maps of the city. They classified all of its land into specific use, height, and area districts.

Although existing buildings were not affected by the new system, generations of buildings yet unborn would arise within the three-dimensional limits or envelope of the new controls. At no point in the first generation of the modern American planning movement is there clearer evidence than here of the vast gap which stretched between the reforming planner's infatuation with the thinking and practices of urban Europe and the actual demands of his own culture. If there was any place at which Ebenezer Howard's idea of consciously controlling the size of towns might crystallize into law, it was here. The idea was absolutely rejected in the 1916 Report. Bizarrely enough, it was rejected within the four corners of the same official document which simultaneously insisted that "City planning is a prime need of our city. It is plain common sense to have a plan before starting to build. City building is no exception to the rule. Haphazard city building without a comprehensive plan is ruinous . . . New York City has reached a point beyond which continued unplanned growth cannot take place without inviting social and economic disaster. It is too big a city, the social and economic interests involved are too great to permit the continuance of the *laissez faire* methods of earlier days." ⁵⁰

The language sounded like authentic Anglo-German planning language, yet its meaning was very different. "No limit can be set to the growth and expansion of the city,"⁵¹ states the report. It was quoting with approval Robert H. Whitten, who was shortly to become one of the nation's most prominent planning and zoning consultants. Bassett, who dealt constantly with Whitten until the planner's death in 1936, described him as one who "contributed far more to the upbuilding of zoning in this country than I did."⁵²

Every age in every culture has its special illusions. It is therefore hardly patronizing the American reformer of the early twentieth century to suggest that there was something about his peculiar species of optimism which steadily obscured the price urban America had to pay to purchase the progress for which he often fought so admirably. He was taken with urban planning and zoning because of their tangible results he saw and heard about in western Europe. Frank Backus Williams, the lawyer who had made the extremely detailed study of the European zoning experience for the 1913 Commission, appeared several times before the 1916 Commission. By then he was chairman of the City Club's Committee on City Planning. He talked about the German achievement. "Conditions in Germany and Austria are no doubt different from conditions in New York; but, after all, there is a general similarity in cities in civilized western countries the world over . . ." In his own italics, he insisted that zoning "*does*, in my opinion, lessen congestion in overcrowded Germany; it *does* make city land more useful and valuable; it *does* tend to prevent the useless and costly changes in the character of localities; it *does* stabilize values; it *does* make living conditions more comfortable and convenient and business more economical and efficient."⁵³

Yet, as the 1916 Report reflects, despite such cautious but insistent advice that the legal institution ought to be transplanted from one culture to another, the genuine nature of the institution was elusive. Whether compelled by practical American circumstances or encouraged by the seeming identities between America's culture and those of western Europe, the reformer never quite understood the ill-defined yet crucial differences between the assumptions those cultures made about the care and building of cities. Or when he did, a man like Williams seemed to believe that such differences could be resolved by using an imported institution like zoning to develop in the United States the underlying attitudes out of which it had originally been created in Europe. The conviction—shared by thinkers

of as long ago as the classic Greeks—was that a legal institution may not only gratify some deep public need for higher standards of conduct but educate the public to want them as well. Yet in the absence of a willingness to bend the future of urban growth to the ends of a better urban life—to plan effectively—the most the new zoning institution could teach was that private property had lost some of its exalted privacy. This was certainly one of many changes of attitude necessary if European-style planning was to be done in America's cities—but only one.

Aimless legal power is at best a public misfortune. When the 1916 Report rejected the idea of assuming, for example, a model type of residence because of the complexities of real life, it was hardly a meaningful alternative to drop the whole business by announcing that complexity compelled relative standards which then went undefined. Nor, in view of the magnitude of zoning powers about to be taken on by many other American cities, was it enough to say that this new law would no longer permit the stable to foul the neighborhood. It was not enough because zoning was supposed to be a planning instrument. While the institution was capable of prohibiting certain conduct, it was also capable of protecting and provoking other forms of it.

A decision to use a legal institution to continue a *status quo* may be an authentic planning decision—for example, any public confirmation of an existing land use. But here a great deal more was involved. The tide of American urbanism was now running in heavily.

The touchstone, the great goal of the 1916 Report was “stability,” quite a slippery thing as it turned out. In the easiest cases of incompatible uses—the glue factory in the neighborhood—it was clear that stability meant only making the residential area homogeneous. Today's neighborhood will be a neighborhood tomorrow. The nugget of the idea of stability was not a concern over the quality of urban life nearly as much as a preoccupation with real estate values. Stripped of his puffing and myth-making, the influential Fifth Avenue merchant was groping for the permanent amenity of a fine shopping center whose ultimate point, as Burton had conceded, was no more complicated than an ever rising land market.

The empty space between existing buildings and the contours of the zoning envelope was not the *status quo*. Rather like a massive Jamesian version of the blooming, buzzing confusion which describes the infant's mind, it was teeming with the unexamined, unchecked possibilities of the future. In that blank area lay the potential mass of New York's

building development and therefore the number of human beings who might live, work, and play on the city's land. The report was much vaguer about that future than were many builders. In the final days before the enactment of the zoning resolution, they hedged it by deluging the Manhattan Building Bureau with construction plans whose approval would escape the new law's restrictions. Plans submitted during those last days included a number for skyscrapers and the largest apartment house in the city.⁵⁴

In the midst of the widespread enthusiasm for the new resolution, Williams and Veiller demonstrated a shrewd appreciation of its coming influence upon the rest of the nation. Williams wrote that "The distinctive contribution that New York has made to the progress of the districting movement in this country is in recognizing the value of districting *as a system*." ⁵⁵ Veiller well understood that "Like many other things in that great centre of population, what is done there is of value to the whole country. With the adoption of such regulations in New York City, a wave will spread throughout the entire land, even into the smaller cities, a wave of public sentiment for the adoption of similar regulations. In many cities throughout the country people will say as they do so often: 'If New York can do this, why can't we?' and they will start in and begin to district their own towns." ⁵⁶

By the spring of 1918 New York had "become a Mecca for pilgrimages of citizens and officials who would have their cities profit by her example."⁵⁷ Within a year after passage of the resolution, over twenty cities across the nation had begun one of the most remarkable legislative campaigns in American history.⁵⁸ Although even the driest statistics of zoning's growth turned out to be impressive enough, none of them caught the flavor of the movement which New York's Mayor Hylan sensed from the beginning. Purdy, whose regard for Hylan's intellect was not unbounded, wrote that during their 1916 deliberations the commissioners "realized the importance of this work, but Mayor Hylan who was pretty stupid, didn't know nor care anything about zoning until a particular meeting of the Board of Estimate." Few citizens attended most of those meetings but an overflow crowd from Flushing appeared at one of them to resist the establishment of a business district in their area. After they registered their monolithic opposition, they turned and promptly left. "Mayor Hylan," observed Purdy, "was amazed as he watched all the voters going out the door, and he gasped, 'This zoning business is loaded.'" ⁵⁹

The growth of zoning in the United States was phenomenal. It swept the nation in the 1920's. During this period of its explosive expansion, it quickly lost whatever reforming tendencies it might have carried over from the earlier years of the century. Its original sponsorship by zealous reform types fell away as it became the desired institution of men whose principal interest was the condition of the real estate market. But some pretense of reform lingered. Much of the transformation occurred in the name of urban planning and its promise of a better city.

The same combination of reform and real estate which made the New York Resolution was also responsible for the national promotion of zoning. It was not until the institution had become little more than an extension of private real estate interests in the latter twenties that the most serious intellectual discontent set in. Many of zoning's first idealistic enthusiasts went through a change of heart parallel to the disenchantment of the American artist of the twenties. Their working materials seemed utterly different: the aimless glamor of the expatriate and the lumpy accounts from city hall. But they shared a fundamental attitude about the inadequacy of life in the cities and towns of America which spawned their criticism. As the new decade opened, deep protest had already begun to flow.

In 1922 Harold Stearns, as editor, gathered together a group of essays by intellectuals prominent in many walks of national life. It was published under the title, *Civilization in the United States*. Samuel Eliot Morison called it both a "remarkable symposium" and "one long moan by thirty solemn young men on American mediocrity, sterility, conformity, and smug prosperity."¹ While not one of its contributors, Malcolm Cowley was a charter member of the group which produced it. He criticized its

constricted view, its ignorance of great sectors of the nation. "The civilization which they really surveyed was the civilization shared in by people over thirty, with incomes between two thousand and twenty thousand dollars, living in cities north of the Ohio and east of the Rockies." ²

The first essay was "The City," by Lewis Mumford. "To-day," he wrote, "more than one-half the population of the United States lives in an environment which the jerry-builder, the real estate speculator, the paving contractor, and the industrialist have largely created. Have we begotten a civilization?" ³ For him the finest example of a "genuine community" was the New England town with its common life of religion, politics, and social relations. Picking out New York, Pittsburgh, Chicago, and St. Louis as prototypes of the city built during America's industrialization, he suggested that "the supreme occupation of [their] founders was with the goods of life rather than the good life." ⁴

The very things which generated zoning controls in New York—"The highest achievements of our material civilization—and at their best our hotels, our department stores, and our Woolworth towers are achievements"—were the very things which Mumford saw as "symptoms of its spiritual failure. In order to cover up the vacancy of getting and spending in our cities, we have invented a thousand fresh devices for getting and spending. As a consequence our life is externalized. The principal institutions of the American city are merely distractions that take our eyes off the environment, instead of instruments which would help us mould it creatively a little nearer to humane hopes and desires." ⁵

The attack mounted. The industrial age was a "horror," made so partially because Americans believed that its manifestations were things of shame. Rather than humanize the industrial city, they dehumanized themselves. "The growth of the American city has resulted less in the establishment of civilized standards of life than in the extension of Suburbia." ⁶

Nowhere in Mumford's broadside does the reader find mention of zoning. Yet the symbols of material achievement were now part of the opening history of the institution. The goods of life, and an exotic few at that, which engaged the New York pioneers were essentially material goods. The root question of how the physical environment connected with the quality of urban life, and how the law connected with them both, was never more than marginally considered in the New York episode. As far as the suburbs were concerned, their extension became one of the great movements of the twenties. Whatever the quality of their life turned out

to be, the major issues of zoning in mid-century were to develop there. But zoning had to be installed in the big cities of America. That was one of the achievements of the twenties.

Arrested by the national involvement in the war, urban planning activities just before the twenties developed little worthy of comment. The one important exception grew from the housing crisis during mobilization and carried over into the next decade.

In 1923 a tiny intellectual coterie, numbering Mumford, architects Clarence Stein, Henry Wright, and Frederick L. Ackerman, and idealistic New York real estate operator Alexander M. Bing, formed the Regional Planning Association of America.⁷ They were disillusioned over urban conditions, particularly housing, and yet were stimulated by brief experiments that had been made in wartime housing for munitions plant workers. They struck out against the rising concentrations in the centers of American cities and the aimless spread of the suburbs. Their ideological role was to keep the garden city idea from drowning in the great tide of planless urbanism spreading across the United States. In conducting their mission, they managed to keep alive the principle of limits which animated European planning and zoning thought. They did it by attacking the unending assumption that the American city would and should never stop growing. The proof of the assumption was easily come by.

By the end of the twenties downtown America was piling up skyscrapers.⁸ They were one indication of a crucial turning point in American life. The opening of the decade ended what had been more than three centuries of a predominantly rural civilization. Over half the nation was now living in urban areas.

The "urban" classification was a purely statistical concept of the Bureau of the Census. Such areas included any community over twenty-five hundred inhabitants; thus the greatest of cities and most modest of towns were lumped together. But something deeply qualitative was involved of which the numerical shift was but a clue.

The ultimate significance of any city is bound up in the way its inhabitants live and the influence their urban way of life has upon the rest of the nation. Far from dying during the twenties, American rural values found vigorous expression throughout the culture. But it was a decade during which much energy was turned to fighting a kind of defensive action. William E. Leuchtenburg put it aptly. "The war between the country and the city had been fought for decades. What was new about the

situation in the 1920's was the tension within each camp as well. On the one hand, people on farms and in the small towns could not help but know, even if they would not always admit, how deeply their own lives had been affected by the appeal of the city. They knew that not merely was America changing but they themselves were changing. On the other hand, the very men who symbolized the triumph of the city were themselves among the most reluctant to see the death of the old order." ⁹

The election of 1928 was many things, but certainly it was a fight between a candidate from the farm and one from New York's sidewalks. Herbert Hoover's defeat of Alfred E. Smith marked the last time that rural America's values were to win out in a national election.

The American cities of the 1920's spread their effect by automobile, radio, the press, and the drawing power of shopping facilities and entertaining diversions. Their influence went out much beyond the boundaries drawn by the census. If each city was sending forth its own ring of widening waves, the great metropolitan communities were beginning to form connections at the margins where their influences overlapped with those of the next metropolis. And, coupled with the power of motion pictures and national advertising, the same forces which helped cast the influence of the city out beyond its bounds also helped draw the nation together into a more commonly shared culture, a culture typically made in the city.

The greatest receptacle of these effects was the metropolitan community. "It cannot be too strongly emphasized that the modern metropolitan community is practically a new social and economic entity, comparable in some respects with the city state of ancient and medieval times, but in other respects unprecedented." ¹⁰

The movements which formed the metropolitan community were uniquely from the twentieth century. Increasing numbers of people were concentrating in urban areas, but, in addition, the American population as a whole was heading in the same direction. In 1910 about 45 per cent of the population lived in the metropolitan community. In 1920 it had grown to 48 per cent and in 1930 to nearly 53 per cent.

With the onset of the twenties the great cities of the United States had become powerful magnets. Not only was half the population now in urban areas, but, even more significantly, about the same proportion of America was living within an hour's drive of some city of at least one hundred thousand people. The vast migration moved in a pattern which, like planetary satellites, saw the smaller cities clustered about the larger ones.

The areas which were becoming newly urban (that is, 2,500 or more) were typically suburbs of the great city rather than isolated rural towns. Between 1920 and 1930, for example, thirty-eight municipalities were incorporated in Illinois. Twenty-nine of them were suburbs of Chicago or St. Louis.

The magnet of the huge city turned into an ever more attractive force. With growing concentration, new forms of divided and specialized labor developed increasingly varied sophisticated goods and services. But one of the costs of this metropolitan process was aggravated congestion. The striking development of the suburbs during the twenties was an unguided effort to take advantage of the opportunities of the metropolis without having to pay their price.

The great shift in population was actually a double movement, centrifugal and centripetal. As each metropolis grew absolutely by concentration, it was also experiencing the internal dispersion of suburbanization. The areas outside the central cities were growing at more than twice the rate of their cores. The rate was greatest in the largest metropolitan districts, a term used to designate the territory in which local population carried on its daily social and economic activities through a common system of services and local institutions. Crucial to the concept is the commuting area of the central city. Usually the commuting pattern ran out ten to fifteen miles from the central business districts although some cities claimed substantial groups of daily commuters coming from twenty to forty miles away.

By the end of the twenties nearly a third of the metropolitan population lived outside the central city. In Boston and Pittsburgh it was twice as great. The growth of the suburbs was, of course, not simply the result of out-migration from the central city. But there was unmistakable evidence of that tendency. It had apparently accelerated during the twenties in Philadelphia, Boston, St. Louis, and Detroit.

The mass production of the automobile during the decade was the greatest single instrument for the suburbanization of residential America, often by the upper income classes. They frequently moved at some essential expense to the central city. Spectacular examples of the growth of the exclusive residential suburb occurred around Los Angeles (Beverly Hills, Glendale, Inglewood, Huntington Park), Cleveland (Cleveland Heights, Shaker Heights, Garfield Heights), Detroit (Grosse Point Park, Ferndale), St. Louis (Webster Groves, Maplewood, Richmond Heights), and Chicago (Elmwood Park, Oak Park, Park Ridge).

The suburbs were among the first municipalities in the nation to enact zoning. During the twenties they were prime contributors to the extraordinary spread of the institution.

In his annual speech to the Zenith Real Estate Board, George F. Babbitt added his support to the outward growth of the American City. "We've got a lot to do in the way of extending the paving of motor boulevards, for, believe me, it's the fellow with four to ten thousand a year, say, and an automobile and a nice little family in a bungalow on the edge of town, that makes the wheels of progress go round!" As he told his fellow-citizens of Zip City, "by the last census, there were no less than sixty-eight glorious American burgs with a population of over one hundred thousand! And all these cities stand together for power and purity, and against foreign ideas and communism . . ." ¹¹

But there was one foreign idea for which they showed the warmest favor, zoning. By the end of the twenties, fifty-six of those sixty-eight cities were zoned. When 1916 ended, eight cities had enacted zoning controls. With the conclusion of the twenties there were nearly eight hundred zoned municipalities in the United States. Three-fifths of the urban population, some thirty-seven million people, were living under zoning controls.¹²

Unlike federal legislation in which a single act gives law to the entire nation, zoning controls had to be passed in enabling laws of state legislatures and ordinances of city councils. That such a swift spread of law could occur despite the intricate processes of many state legislatures and hundreds of local governments is at least statistically extraordinary. It happened during a decade in which a best-selling book portrayed Jesus as a crack salesman.¹³ A major selling campaign had a great deal to do with zoning's national triumph during the twenties.

After the passage of the 1916 Resolution in New York, Edward Bassett and several others who had been involved in the effort formed a committee in New York City to watch over the administration of the new law and spread the word of its success to the nation. Their original motives were noble and practical. They rested in part on the conviction that the controls were a promising method of furthering well-made city plans and they were reaping excellent results. In the mid-twenties Bassett summarized the New York situation. "*No blighted districts have begun in this city since the zoning was established*, but on the contrary, some that had begun have been redeemed." ¹⁴

Mixed with the urge to bring progress to the cities of America was an

equal share of pragmatic legal strategy. In a governmental system like that of the United States in which the courts have the power to review and nullify legislation, the authors of novel measures like the 1916 Resolution must do their drafting with an eye toward the inevitable day when their work must withstand the challenge of litigation.

A judge's hunger for certainty is never more gnawing than when he must decide the validity of a novel law. His hunger is matched by that of the lawyer who has to defend such isolated legislation. Nothing is more productive of professional anxiety in the American bench and bar than the charge that a challenged law is unprecedented. Bassett understood this psychology perfectly. He knew that the inevitable disquiet could be eased by simply removing the stigma of novelty from zoning. Thus, at the very outset, he resolved to build up a backlog of similar legislation in the cities throughout the United States. If zoning were brought to court by the time other cities had adopted controls, whatever their technical problems, its proponents could at least argue that their work enjoyed widespread public approval. Given the American system of judicial review, the fate of legislation may not turn on a popularity poll. But only the abysmally impractical or illiterate would deny the value of defending pioneering law by arguing that it is part of a great movement sweeping the country.

In 1930, with the zoning movement well over the hurdle of its 1926 test case in the Supreme Court of the United States, Bassett wrote that the early period of the new law was precarious, so precarious that his New York committee decided to get a national movement under way. "It was feared that, if Greater New York was the only city to make this intimate use of the police power, the courts might annul zoning because it was not widely adopted."¹⁵ Bassett and Lawson Purdy reasoned that since the police power was the foundation of zoning, and since the courts' acceptance of the foundation "depended to a large extent on the general use and application of that form of regulation, we ought to spread zoning throughout the country."¹⁶

If this had something of the character of juridical bootstrapping, it was successful bootstrapping. By the time the decade was over, so many cities had adopted zoning that its proponents could speak casually of its massive acceptance. It was done through what Bassett called, with deserving precision, the "spreading process."¹⁷

When the New York committee formed after passage of the 1916 Resolution, Bassett became its paid counsel. In the five previous years he had

devoted to getting the resolution drafted and adopted, he had received no fees or other compensation for his great labors although he had devoted a third of his time to the task. Part of his work for the retainer was leading the national movement. In his *Autobiography* he wrote:

During the next twenty years I visited every state and all the large cities of the country. This work, however, was not gratuitous. I established a uniform charge of \$100 per day for time away from the office including travel time, plus travel expenses. In going to Florida, the far West, New Orleans or the Pacific Coast our office would arrange a paid itinerary. On these trips I made talks before boards of trade, legislative bodies, both state and city, assisted in drawing zoning ordinances and state enabling acts for zoning, tried zoning cases, and argued test cases before appellate courts. From 1917 to 1927 I had about all of this work that I could do and still have some time to spare for my necessary office work.¹⁸

His appearances in Chicago shed light on the nature of this circuit-riding crusade. Before the turn of the century Chicago was struggling to control the height of its buildings. Beginning with a mayoral veto of an ordinance placing a 150-foot limit, the city went through a number of legislative changes. By 1920 it had raised the limit to 260 feet,¹⁹ and in the early twenties it established a zoning commission to consider the prospects of bringing such controls to Chicago. In order to give the commission the views of Chicago's downtown real estate interests, the city's Real Estate Board made detailed studies of the issues surrounding the zoning question. These were indistinguishable in principle from New York's: such "technical" problems as light and air were pitted against other considerations such as the fact that "the people of Chicago, as of most American cities, are possessed by what might be called the high building psychology: The high building is an American development; it expresses power and business success; and it advertises the city and its business."²⁰

Having absorbed the 1913 Report and received advice from New York experts such as Purdy, in 1922 Chicago real estate groups invited Edward Bassett to speak to them. Genuinely disclaiming expertise in anything but zoning's legal aspects, he identified easily with his audiences. He knew their city well, having spent much time there. He had been active in developing the Illinois zoning enabling legislation. There was, therefore, something modest yet comfortably professional about him. He reassured his audiences that if zoning came to Chicago, they need not fear that it would disrupt any private contractual restrictions which owners might im-

pose on their land by deeds or covenants. Neither title companies nor lenders would find that zoning interfered with these arrangements. Nor would it curb agreements which put restrictions on the minimum cost or aesthetic features of houses.²¹

He told Chicago what he told other cities. Every city was unique and therefore ought to tailor its own scheme of zoning. To imitate would be disastrous. Yet imitation of the basic legal apparatus was not only possible, but inevitable, for zoning's national promoters were urging a particular set of controls, not any particular formula for building height or land use. He told them not to worry about the height question, for once zoning was in force a while the question would lose interest. In New York architects and owners now liked the pyramidal shapes emerging from the setback controls.²²

The constant questions under zoning were first those of land use and then questions of building area on land.

In outlying residential districts where the one-family house prevailed, the course of zoning was not only smooth, but it led to a rising demand for more restrictive zoning in larger areas. These "districts became so popular that acres and miles of outlying territory were petitioning to get into" them.²³

Where the tighter residential restrictions on lot area were imposed, "Values went up because a man could found a home for himself and could pass it down to his children and his children's children. It helped to keep people in Greater New York instead of causing migration of successful men to Connecticut, Long Island, New Jersey and Westchester County, the very class of people that we most wanted there."²⁴ The stricter the residential restrictions on lot coverage and yards, the stronger the demand for even more restrictions.

By the mid-twenties, then, one distinct pattern of social control effected by zoning had begun to take shape. The precipitating problem of the skyscraper was no longer a problem at all. The structure had been accepted whole, and the only task being asked of zoning was to trim its edges just enough to let in more light and air than monolithic development would allow. But there was a durable element in the Fifth Avenue experience. It now appeared in a different shell—the residence rather than the retail shop—but the same kernel of social homogeneity was there. "You see by the natural application of zoning principles it has brought about a more

restricted residential district and it was brought about because the people at large wanted it.”²⁵

As far as the question of real estate values was concerned, it had lost neither intensity nor centrality by the time Bassett came to Chicago. He assured his listeners that since the enactment of zoning, building values had bettered throughout New York City. The small homeowner and the little shopkeeper were now protected against destructive uses next door. Land in the lower Fifth Avenue section, which had been a drug on the market when zoning arrived, was now undergoing so successful a residential improvement that rents were on the rise. “Blighted districts are no longer produced in New York City.”²⁶

Bassett suggested that what New York had achieved contained another lesson, proved by Philadelphia’s failure. There, zoning was rejected for lack of adequate preparation. Unlike New York, where “the people handled all of the zoning for the city,”²⁷ Philadelphia tried to legislate without taking the “people” into its confidence. It turned out that the people there were actually a tiny group of downtown land and building owners who believed that zoning would cause losses for their holdings. As a result, they mounted a campaign against the proposal and defeated it.²⁸ In contrast, the people of New York “told the Commission what to do. After the Commission had been instructed by the people it was to a large extent the people’s plan, and it went through flying.”²⁹ But in the final analysis Bassett was candid enough to tell his Chicago audience just whom he meant by the people of Chicago. “It is the practical people of this town that in the last resort are going to say what . . . [height] limit will be.”³⁰ It was clear that they were owners of real estate.

Perhaps the most historically interesting thing Bassett had to say to Chicago related to planning, those broad city-wide concerns which were supposed to be at the root of zoning. His statement was just as atrophied as the attitude of the two massive New York reports. The question came at him in the form of a growing issue about department stores in Chicago’s downtown Loop district. A speaker said that outlying areas had strong feelings against concentrating department stores there instead of scattering them outside the center city. If owners in the Loop were satisfied with height controls, “how much attention should be given to those whose interests are entirely outside of the zoning district in the Loop?”³¹

Bassett replied:

Outside of all questions of benefit which, of course, is an element in all these questions, I would answer your question by saying that not much weight should be given to the desires or ambitions of people outside of the area zoned.

My reason for that is rather practical. In an area, which, because of its topography has transit, its natural advantages, it seems to me, entitle it to what the Lord will give it and when you once get on the basis of different communities figuring and voting what ought to be allowed to various localities instead of letting nature largely control it, the question becomes so complex it results in unfairness.³²

Sooner or later it got back to the same thing, and that was not planning. After traveling throughout the United States and Canada some Chicagoans who were studying zoning visited New York, where they heard Bassett speak. A realtor who later introduced him at one of his Chicago appearances revealed the basis of the interest the city's real estate owners had in zoning. "Do you remember that Mr. Bassett said that it was going to increase the values of property in Chicago one billion dollars? There is no member of the Chicago Real Estate Board who would not give up all chance of a dollar and a half commission today to get a crack at their share of the billion dollars in the future. That accounts for the interest of the Chicago Real Estate Board in zoning Chicago." ³³

Bassett's effectiveness came as much from his moderation and transparent honesty as his impressive knowledge of the young field. He talked often about real estate exploiters but typically in disinterested terms. Rather than wanting to offend or criticize them, he thought that if he were in such an investment position he would share their view of zoning. He wanted only to suggest that "there is a lot of human nature in zoning." ³⁴

New York had made mistakes, and he did not hesitate to talk about them. One of his strongest feelings was that very tall buildings were unnecessary and undesirable even though very little could be done about them. He criticized New York's toleration of congested tenement districts. If the New York pioneers had had it to do again, they would have prevented the congestion. But in the next breath he added: "I don't know that we could." ³⁵

There was an absurdity about this whole business. It showed through one of Bassett's Chicago statements. "It does not lie in the power of people that may decide what is for the city's benefit, to hew to the line in getting what is for the city's benefit, however hard they try. We tried to prevent

congested tenement houses in New York City, but even under zoning, a very congested type of tenement house can still be built. We are trying to bring about some amelioration to that, but the officials are not responding as readily as we might wish because they do not feel any popular demand." ³⁶

Discontent is the precondition of reform. The reformers who first wanted planning and zoning had their portion of it. They well knew what the urban problems were, the overcrowding, the destruction of important amenities, the senseless growth. Once zoning had been applied, they also quickly learned that it was not basically used to deal with the problems which were supposed to have generated the original demand for it. Yet they kept fighting for it long after they had conceded that where the social needs were greatest zoning would not deal with them.

A good deal of the absurdity sprang from the confusing use of the word "people." Although respectful of the theory of popular government, the reformers knew that the demand neither for zoning nor for planning had grown out of any widespread outcry in the cities of the United States. It was not a mass demand any more than its gratification was massive. Yet the new law quickly got surrounded with a contrary fiction which treated political reality as if it squared with the political theory of popular sovereignty. An essential part of this delusion was the continued belief that zoning in America could be made to behave as it did in Germany without being tied to public planning powers which were alien to the American cultural tradition.

When they brought zoning to the United States, the reformers of the early part of the century were gambling against the force of that tradition. Like all bets, the gamble had a good deal of pure faith in it. Optimism is the gambler's stock in trade. But it also rested on efforts to change the tradition by educating urban Americans to want and accept the reformers' vision of a better city and their planning formula for getting it. By the time the zoning campaign got under way in the twenties the educational aspects had disappeared.

Here was Bassett, a classic reformer type, urging the cities of the nation to build a broad enough base of demand to get zoning legislation passed while conceding that the larger social functions it might perform were beyond attainment. What, then, was the reformers' purpose in the crusade of the twenties?

For some it was probably no more complicated or less romantic than an

effort to create professional opportunities by establishing a new field of work. For others, the means seemed to have become the end. It is one of the peculiar themes of its early history that the institution itself, rather than its original purposes, generated the greatest excitement throughout the nation. Like many mass-produced items, apparently one of the important reasons zoning sold was simply that a lot of others had it.

It was part of the promotional appeal that things had to be accepted for what they were rather than for what they might be. In Chicago, Bassett told his audiences of practical businessmen: "We deal with a condition and not a theory. Therefore, for my own part I have long since got past that stage where I spend much time talking about ideal conditions in the built up parts of the city, and especially in the intensively built up parts of a city."³⁷

It was never clearer than in Bassett's visit to Chicago just how great the gap was between the original intent of zoning and what it had become in the New York experience. Bassett spoke of the trying period during which the Hearst press had turned against zoning because of the publisher's concern for his own real estate holdings, "but fortunately there was a popular agitation and popular desire in New York that carried us past that crisis. Because as I have said once or twice, in New York the city did not know how to zone; it appointed a commission, and the commission did not know how to zone, so it went to the people, the property owners, to find out, and it was advised by every section of the city and every kind of property owner, so when the plan was formed, it was purely the 'property owners' plan. That was the only thing that prevented . . . beating the life out of it."³⁸

In addition to their unofficial efforts to spread the growth of zoning into America's cities, the second great contribution of the reforming fathers was their work with the federal government. Washington occupied a uniquely important role as promoter of the new law, and one of Bassett's important activities during the period was his work there.

During the twenties Washington had once again become little more than another American city, rather than the general seat of most public authority in the United States. Early in the century Progressivism, with its excited discovery of the central government, had influenced the way Americans thought about their national capital. World War I added to the effect by giving powerful instruction in the possibilities of using the federal authority to manage the economy and organize the nation's resources to deal with a very specific problem. If suspected and resented, it was also

impressively obeyed for the duration. But with the end of hostilities came the tremendous reaction, euphemistically called "normalcy," which accounts for the standard version of national life during the twenties. One of the better economic histories of the period concludes that the "Movements for reform were held in check while private business had its way, economically and politically."³⁹

The Harding administration recruited a strange collection of national leaders to run the federal government. Not since the Grant era had there been such laxity in public life. In 1924 young Christian Herter left the government because "Washington is a dirty kitchen where cockroaches abound."⁴⁰ Yet there had rarely been appointments of higher quality than in men like Secretary of State Charles Evans Hughes and Secretary of Commerce Herbert Hoover.

When Hoover came to the Department of Commerce he was convinced that he could make a great contribution to the growth of employment and postwar construction by supplying "the greatest social need of the country—more and better housing."⁴¹ Early in his office he established a Division of Building and Housing in the Bureau of Standards under Dr. John M. Gries to stimulate the housing supply. As part of its policy the department organized and encouraged a movement to bring zoning to the American cities. The object was to protect the nation's homeowners from destructive land uses such as that of factories in neighborhoods.

In September 1921 Hoover appointed an Advisory Committee on Zoning. It was heavily composed of men who had come out of the urban reform movement. Three of them—Edward Bassett, Lawrence Veiller, and Nelson P. Lewis—had been intimately involved in the New York effort. Most of them had direct affiliations with the American urban planning movement.

In less than a year the committee had drafted and the government had issued a Standard State Zoning Enabling Act. It furnished state and local governments with a text which, if adopted by state legislatures, granted their towns and cities the police power to zone. Its first issue and its revision were mimeographed. In May 1924 the first printed edition was published. It sold more than fifty-five thousand copies,⁴² thereby becoming a best-seller by any standards. Within a year of its original issue, nearly one-quarter of the states in every corner of the nation had passed enabling acts which were modeled substantially on the Standard Act.⁴³

This was statutory boiler plate made in New York. The explanatory

notes confidently affirmed the basic assumption the New York commissioners had nervously made: "Zoning is undertaken under the police power and is well within the powers granted to the legislature by the constitutions of the various States." ⁴⁴ All of the purposes which the reports of 1913 and 1916 had cited in defense of the controls appeared in the Standard Act. The system of controls was the same. Planning was at the heart of it. "Such regulations shall be made in accordance with a comprehensive plan . . ." ⁴⁵

Perhaps the most interesting single feature of the act was its announcement that the regulation of population density was one of its purposes. The notes state: "The power to regulate density of population is comparatively new in zoning practice. It is, however, highly desirable." ⁴⁶ The explanation began by sounding curiously like the thinking of Ebenezer Howard, but ended with a completely different objective. "It is believed that, with proper restrictions, this provision will make possible the creation of one-family residence districts." ⁴⁷

As the Department of Commerce was running off editions of the Standard Act and keeping the rising score of legislation, Bassett was also systematizing the accumulating experience of zoning in the courts, in a combination of detached analysis of the trend of decisional law around the nation and an advocate's brief for the constitutionality of zoning. ⁴⁸

All of this material was of the greatest practical use at the municipal level. It carried the imprint of a federal department run by one of the most admired public figures in the nation. It bore the stamp of the respected New York pioneers who now had Washington as a forum in which they could bear witness to their city's achievement. And, pedestrian as it may seem, it enjoyed the blessing of tangibility. There stood the polished, printed words sparing local governments the struggle of drafting proposed legislation to be carried anxiously to their state legislatures.

There was no basic paradox in having one of the most important reform measures of the prewar years sponsored by the Harding administration. What had happened in New York was simply one legal institution's anticipation of the brand of normalcy to which Harding had promised to return the nation. New York had shown that an institution of law takes its purpose from the forces which have the power to shape it.

Even though the Hoover committee had a nominal bias in favor of planning, it was peculiarly American. The major European influences in American planning thought during the twenties were to be found in the tiny

Regional Planning Association of America. It had no representation on the Hoover committee. Even if it had, it almost certainly would have made no final difference in bringing zoning into line with its original theory. The twenties enriched the history of American jurisprudence with a vast demonstration that there is no necessary relationship between the values of those who set the goals of laws and the values of those who are supposed to accept them. Like the assumptions of Prohibition, those of the European planning movement fell very wide of the American cultural reality. One of the contributions of the twenties was a mass of urban evidence which showed just how wide the gap was between the original planning theory of zoning and its actual applications in the nation's towns and cities.

Near the end of the decade a national survey of American zoning and planning experts asked: "What is the proper relation of zoning and city planning?"⁴⁹ Thomas Adams, general director of the Regional Plan of New York and Its Environs, answered: "Zoning is part of city planning, and city planning should not be carried out in parts. Every part of a comprehensive city plan is interrelated with the other parts and all need to be coordinated for the purpose of obtaining a logical and effective plan. There is urgent need to revise zoning methods and to begin applying zoning on a basis that will be reasonably effective and permanent, and therefore equitable. This improvement will only be possible when zoning is based on sound principles and is related more to health and safety and less to land values."⁵⁰

Alfred Bettman, a lawyer who occupies a major place in the history of the zoning movement, was chairman of the Cincinnati City Planning Commission when he wrote: "The city plan and the zone plan are not two separate things. One is the whole and the other is a part. The zone plan is that part of the city plan which relates to developments on private property, whereas the other parts of the city plan relate to public developments. The relationship of the two is so obvious and so integral, that there can be but one answer to the question of whether a good zone plan can be made without making it a part of a more comprehensive plan. There surely cannot."⁵¹ Essentially the same thought came from cities throughout the nation.

Yet in spite of this litany of municipal officials, planning lawyers, and consultants, zoning's divorce from comprehensive planning suggested that those who were finally responsible for mass producing zoning did not subscribe to the litany.

By the late twenties, only six states had cities with neither zoning ordinances nor a completed comprehensive plan. But for every city which had a plan, there were more than four with a zoning ordinance but no such plan. In New York State the ratio was nine to one, in Illinois and California about five to one, and almost eight to one in New Jersey.⁵²

If the theory was accurate that there could be no proper zoning without adequate planning, there was at least one obvious conclusion in these disproportions. In the name of zoning, something other than the process contemplated by its theoreticians was going on around the nation.

In fact, several warping developments were well under way. One of them was such a mockery of the simplest notions of planning that it would be more precise to call it unplanning, the process of casting away the limits which make controlled urban development possible.

During the twenties the acclaim for New York's zoning accomplishment usually took two forms, admiration for the sheer magnitude of its pioneering, and for the visible change occurring in its skyline. The pyramidal outlines being carved by the setback regulations pleased some who found it an architectural improvement over earlier appearances.⁵³ But however it may have affected the outer shapes of the skyscrapers, it had really not affected their capacity to mass too many people in one place. The ability of zoning to control New York's tall buildings was simply marginal gadgetry. The complaints about overtaxed streets and congestion were just as appropriate a decade after the resolution was passed as they had been during its formative years. The new Chanin Building housed ten thousand people. If they poured out onto the pavement at one time, they would have required a fifteen-foot-wide sidewalk a half-mile long to accommodate them.⁵⁴ The piling-up was part of some large circumstance, the real estate speculator's vision of American city growth. A driving conviction which inspired the new zoning laws around the country was that a city ought never to stop growing, particularly in its business areas.

Crude as the new regulations were, they were designed to fix at least approximately reasonable limits on the land areas set aside for various uses. Yet quantitative investigations during the twenties brought in evidence that weird thinking, not reason, was going into the institution.

Starting from a demonstrated relationship between existing populations and the amount of business space adequate to serve them, they revealed that in a number of cities the zoning allocations for business space had been set at levels of fantasy. The practice was called overzoning.

Burbank, California, had a population of twenty thousand. It was optimistic enough to design its ordinance to allow for a population nearly seven times that size. But the street frontage it zoned for business use would have been enough to serve a million and a half people. Seventy-five thousand people lived in Pasadena. Business got an allocation large enough to serve more than a million. Los Angeles was following zoning policies which provided enough business frontage for more than the entire population of the United States.

California had no monopoly on the fantasy. Portland, Oregon, had done the same thing. Boulder, Colorado, had allocated more than six times its actual business area. The zoning envelope for office buildings in Duluth could have accepted enough building space for twenty million people.⁵⁵

In its allocations New York added a nice touch of historical continuity to the merry prospect the 1811 commissioners had raised by their prodigal provisions of spaces for population growth. If it built to the full extent of the population densities permitted by the zoning envelope and kept all buildings under six hundred feet, its residential districts alone would have housed seventy-seven million people. In the commercial districts there could have been a working population of three hundred and forty-four million. In older areas of Manhattan and Brooklyn, if the land used for business were built to the maximum bulk allowed by the law, it would have taken nine hundred years to complete the task at the rate of construction during the booming twenties.⁵⁶

If dreams of glory did not explain it, what were the other possibilities? With considerable justification, it was said that American zoning was proceeding in a kind of darkness which only scientific learning could dispel. Too little was known of the actual data of urban life, the realistic patterns of land use and space needs for homes, business, industry, and how to allocate them rationally. The complex interrelationships of all the parts of the urban scene needed further revelation. Yet in such studies as those conducted in New York and elsewhere, and in the courses being installed in the American university,⁵⁷ there was at least a first round of quite detailed, systematized information about much that was going on in America's cities, how they used their land, how their people lived and worked, and how competently cities performed the simplest tasks of the planning function. But there would never be enough information to eliminate all the guesswork. The defense did not leave any room for the larger question of what was to be done with the information even if enough of it could be

gathered and understood. The best thing to be said for it, and it was a good deal, was the better the information, the better the opportunity to think about the problems. Planning information is not an end but a necessary basis for appreciating what ought to be done.

In the last analysis the large questions in zoning were not informational or technical but in the highest sense political. Every one of them eventually went, not to the meaning of facts, but to issues of political judgment. Once the power of law is acquired, what is to be done with it? The answers do not lie in the same realm as those which describe the rhythm of the cosmos or the structure of the atom. In matters of urban planning, value judgments are at the center. Microcosms like the Manhattan skyscraper and Fifth Avenue revealed enough of the urban process to teach the fact hunter that no amount of information would generate the best solution. Indeed, information often seemed to have nothing to do with how decisions got made.

The second explanation for the early and pronounced chasm between the abstractions of planning theory and the concrete facts developing around zoning practices was the obverse of information. It went instead to a cultural tradition never more fully flowered than during the mid-twenties, the tradition that nothing would produce something. Real estate promoters were inflating balloons, like the gigantic one in Florida, with the warm gases bubbling up from city development, beach and submarine lots. There was plenty of evidence of boomerism, literary in Babbitt's pitch to his cronies, and historical in the "long national series of cycles of land gambling and town jobbing, which has marked American business annals almost from the time of Columbus to the present day."⁵⁸ In the case of zoning it was expressed in the results of negotiation which municipal governments were conducting with urban property investors and owners. Their condition for political support was overzoning for commercial and residential uses. "Property owners nearly always exerted their influence to maximize the area designated for intensive use, that is, use for apartment houses and other multi-family structures of high density and yielding a high return per acre. Largely as a matter of expediency, but partly out of ignorance, this pressure was yielded to in drafting zoning ordinances."⁵⁹

The Twentieth Century Fund's study, from which this finding comes, describes the stages of escalation which led out of planning into a blue sky. When land was zoned to allow intensive uses, the owners "rapidly began to build mental skyscrapers, department stores or apartment house blocks on their sites. And these visions began to be translated into dollars and

cents. Astute appraisers called them values, and financial institutions made loans on these values.”⁶⁰

The urban landowner drank the same bathtub gin served in the stock market of the twenties. Into a new legal device, which never should have been anything more than one effective method for regulating rational urban growth, went the drunken dream of speculation. A distinguished economist more temperately described it as “the inordinate optimism of property owners.”⁶¹ Certain they were bound to make a killing, they did very little to their land while they waited for a zoning classification to become an economic reality. The hopes became epidemic. “High expectations led to a wild scramble for land; the holders, three or four times removed from the original purchasers, sat back patiently waiting. And [a quarter of a century later] many of them are still waiting.”⁶²

As the spiral turned upward, real estate taxes got caught in it. While the investor waited to realize, his land got taxed upon assumptions of value which often had no relation to real worth. And rising taxation, in turn, helped feed the fiction of higher value. By the mid-1950's the Twentieth Century Fund reported that “High land values in the central sections of our cities are among the principal obstacles to making our cities attractive places in which to live. Even if a builder with great difficulty were able to assemble a sufficient plot of this land, he would be forced, because of its cost, to develop it at a density comparable to the crowded condition which originally contributed to its decay. Hence the paradox that the land which holds a large part of all that is mean and sordid in our cities is also among the most expensive.”⁶³

The frequent gaps between realistic planning considerations and speculators' visions disclosed the great potential for abusing a legal planning institution. Incalculably enormous sums swung in the decisions which initially put urban land into zoning classifications under the new laws being enacted in hundreds of American cities. These original decisions were affected by a cultural temper which also began to seep into the daily administration of zoning. Here, too, the stakes were often great.

One of the fundamental features of the new zoning ordinances had been formulated in the 1916 Resolution and included in the Standard Enabling Act. The administrative board of appeals (or adjustment), whose discretionary powers allowed it to take the harshness out of the strict letter of zoning law, became a device of some interest during the mid-twenties. It was an example of a relatively new kind of administrative tribunal which

was to grow enormously in the vast expansion of the federal government during the thirties—the quasi-judicial board. Neither quite a court nor simply a fact-finding agency, it had attributes of each. Provisions for these boards were typically hedged around by requirements for public hearings and adequate notice of matters to be submitted for relief. In 1924 the *American Bar Association Journal* published an article lauding the arrangement. “In view of the great publicity provided for, and the numerous opportunities afforded for expression of public opinion, it seems extremely unlikely that any special interests could influence the zoning authorities to enact changes which would benefit only a small group of persons.”⁶⁴

Before the decade was over there were serious signs that the zoning board of adjustment was in danger of becoming a latter-day version of the municipal bodies which the infinitely ingenious formula of money and politics had corrupted earlier in the century. Bassett had warned during the mid-twenties that the variance-granting power of these boards “decides the life or death of a zoning ordinance.”⁶⁵ In his own city the rot was well under way at the time he wrote this.

By 1927 the cry of “scandal” in New York’s Board of Standards and Appeals was out. The Citizens’ Union, a reform group, demanded that Mayor Walker cleanse the board, whose decisions had been criticized by reviewing courts. The developing pattern was a purchase of land followed by a swift application to the board for relief from the zoning requirements to permit a use or a height or bulk which violated the regulations in effect at the time of purchase. In one case, for example, the resolution permitted a 25-story office building on a financial district site in a “two and a half” district. The board granted a variance of about five times the street width and raised the building height by over a hundred feet.⁶⁶

The twenties were years which not only produced zoning in hundreds of American cities but also a standard technique for subverting its administration.

In 1931 Judge Samuel Seabury, counsel to a special state legislative committee, began conducting the “most far-reaching investigation in New York City history . . .”⁶⁷ At the outset of its hearings, which ran into 1932, the committee took up the matter of Dr. William F. (“Horse Doctor”) Doyle. Seabury’s biographer, Herbert Mitgang, described Doyle as “one of the biggest grafters in municipal history.”⁶⁸

Doyle started professional life as a veterinary surgeon. During the incubating years of the 1916 Resolution he was chief veterinarian for the city’s

fire department and then became a political appointee on the Bureau of Fire Prevention. Following his indictment for political malfeasance in that office, he resigned in 1917 and began practicing before the Board of Standards and Appeals. There he pleaded the cause of landlords, contractors, and builders who wanted garages where the zoning law prohibited them, wet-wash laundries in residential districts where they were barred, and buildings constructed beyond the height limitations of the law.

He was a rather successful advocate. With no gainful employment other than his board practice, in 1927 he managed to receive fees of more than a quarter of a million dollars. Between 1922 and 1930 he deposited over a million dollars in his bank account.⁶⁹ It turned out that the arrangements which made this possible were basically simple although the fact that they were cash transactions made them a challenge to trace.

The five-man Board of Standards and Appeals was politically appointed. The senior partner of a law firm, who was also the leader of Tammany Hall, used to set audiences for the board's chairman. They would discuss pending cases before the board. While it had a professional interest in them, his firm would not appear on the record but would use other counsel instead. These counsel of record remitted substantial portions of their fees in cash or cashier checks to the silent law firm. Doyle, too, was splitting his fees. At the end of these connected conduits Tammany stood waiting to receive its share.⁷⁰

But that did not quite complete the flow system. Someone had to pay the lawyers and Doyle for results such as relaxed height and use restrictions for Tudor City, a huge Manhattan apartment project. There were also "important properties such as the Irving Trust Building at No. One Wall Street, the Hotel St. Regis, and an entire block front in the Murray Hill residential district, which was re-zoned for business purposes by the Board of Estimate over the protest of many prominent citizens and in spite of previous unsuccessful applications for the same relief."⁷¹ There was more than enough blame to go around. All of it bespoke the same callousness. As the Seabury Committee reported: "The Building Zone Regulations are not merely a bulwark against the destruction of property interests, but they constitute a public health and welfare measure of the first importance . . . the people of the City of New York have a very real and very substantial interest in the proper enforcement of the Building Zone Regulations."⁷²

If all that had happened was the corruption of public office, it would have been historically monotonous business. American municipal villainy

did not have to wait upon zoning to find its first expression. The original feature of this particular bit of malfeasance was its imposition upon what was supposed to be an initial and important effort to make a planning device into an American legal institution. Both business and political decision-makers in a great American city were profoundly indifferent to even the most modest efforts at using law to help the city grow intelligently. In such an environment, it is all that planning can do to stay alive, let alone prosper.

The proliferation of zoning law during the twenties was a remarkable triumph. But it was essentially a statistical tribute to the dedicated men who made it possible, whatever their motives may have been. Its principal uses did not substantially advance the cause of urban planning in the United States because they were not in the service of planning. Despite its frequent invocations, planning was not a part of the ideology of the national mind or that of local legislatures which made the growth possible. The proof was in the actual applications of the new laws.

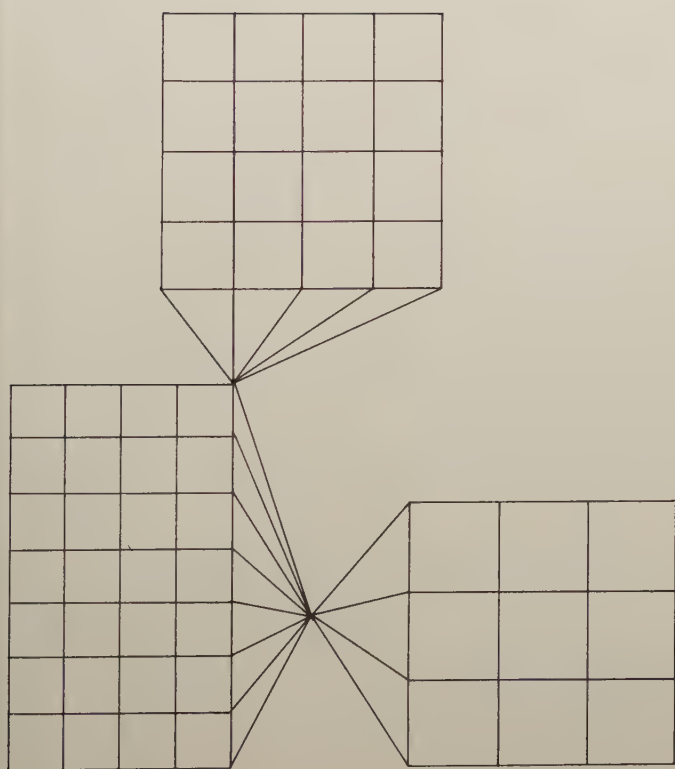
If it did help stabilize some real estate values by protecting them against the destructive threat of incompatible uses, it also inflated others. If it defended the outlying homeowner against the violation of his neighborhoods, it did nothing for the tenement dweller. Perhaps its greatest contribution was not part of its original intention. It was an occasion for bringing a soon neglected idea to the United States and helping to create some of the important job opportunities in which a new planning profession might begin to grow.

A respected history of the twentieth-century planning movement, Robert A. Walker's, *The Planning Function in Urban Government*, acknowledges the early and swift dissociation of planning from zoning. "Real estate interests became highly influential in the movement . . . and the original purpose of utilizing zoning as a means for providing better municipal administration was all but forgotten."⁷³ But as planning was coming to an early death in the first designs of the zoning institution, a parallel development was under way. The new laws started coming under attack in the courts of the nation. Rather than disappear in this litigation, the idea of planning as an important aid to the welfare of the community was apparently being salvaged at the hands of the Supreme Court of the United States.

Part

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A landmark case in American law is one whose legal importance is so great and species so numerous that by the end of his formal education the law student believes the landscape of jurisprudence can accommodate nothing else. Its other characteristic is the oblivion it enjoys in the public mind. The landmark case in American zoning is *Village of Euclid v. Ambler Realty Co.*¹ A decade after passage of the 1916 Resolution the Supreme Court of the United States held in *Euclid* that comprehensive zoning is a constitutional exercise of the police power.

Euclid qualifies as a classic on two scores. Both its constitutional holding and its general character endure. The facts of the case reflect what was happening in a great number of the towns and cities of the twenties. They continue to bear a rather striking resemblance to the style and content of American zoning litigation. In more than forty years since the *Euclid* decision, what was then a relatively small trickle of zoning lawsuits has grown to substantial proportions. The enlarging flow usually came from the same kinds of springs out of which *Euclid* issued. While the case arose in the suburb of a midwestern city, the issues, the arguments, and what might vaguely be called the general tone of the litigation could just as well be found in any other urban area of the nation.

In the late eighteenth century Moses Cleaveland, an agent of the Connecticut Land Company, laid out a town at the mouth of the Cuyahoga River in northeastern Ohio. The company was a syndicate to which a group of speculators deeded a large portion of the Western Reserve which they had purchased from Connecticut.² Cleveland, as the town came to be called, was a quiet commercial post on the route from Pittsburgh to Detroit.

When the Ohio Canal opened to Akron in 1827 and then the Ohio River in 1832, Cleveland was linked to Ohio's interior. It became the outlet port for the state's mineral and farm stuffs. The nearby coal deposits in Ohio, Pennsylvania, and West Virginia and discovery of iron ore in the Lake Superior region gave Cleveland a strategically important location for iron manufacture. These advantages and the arrival of the railroads in the decade before the Civil War sparked the city's growth. During the war it was a major supplier of iron products and clothing to the federal government. By the early twentieth century it had become a great port and manufacturing center, and one of the nation's largest cities.³

At about the time Cleaveland was laying out the new town, an area to the northeast, fronting on Lake Erie, was also being settled. The surveyors who came out with Cleaveland named the place Euclid after the Greek geometrician.

In 1903 Euclid's sixteen square miles, now part of a great industrial community of more than a million people, were incorporated as a village. Until the Supreme Court's 1926 decision, probably its principal claim to national renown developed during the latter nineteenth century. Like New York and many of the booming cities of the Midwest, it had at least one famous residential street lined with great mansions, Euclid Avenue, which ran eastward from Cleveland through the village. In their *American Skyline* Christopher Tunnard and Henry Hope Reed described the avenue's great day. "A double row of trees formed two leafy bowers unbroken by cross streets for a half mile or more, and on either side lawn and garden repeated a seemingly endless vista of beauty. Known as Prosperity Street and Millionaire's Row, it was declared America's most beautiful Avenue and compared favorably with the Nevsky Prospect in St. Petersburg."⁴

By the mid-twentieth century, "to drive along Euclid Avenue is to be rewarded by vistas of blight: gas stations and gaping holes where the mansions of the Age of Steam and Iron have been torn down and the ornate balconies and copper roofs sold off for scrap."⁵

Preserved in the yellowing court documents of *Village of Euclid v. Ambler Realty Co.*⁶ is an essential part of that transition.

The village territory of less than ten thousand people was roughly a rectangle. It extended eastward from the edge of Cleveland for about three and one-half miles along the Lake Erie shore and about the same distance to the south. During several decades before the lawsuit the east-west axis

of the village had been divided by important parallel arteries. Euclid Avenue was the major thoroughfare on the south. To the north ran the Nickel Plate and the Lake Shore railroads, St. Clair Avenue and Lake Shore Boulevard. All these streets had been there for more than a half-century before the lawsuit. When the litigation began, Lake Shore Boulevard was principally a residential street, and St. Clair and Euclid Avenues were important traffic routes into the business and industrial heart of Cleveland.⁷

In 1911, the Ambler Realty Company, a Cleveland real estate business, began to purchase and assemble sixty-eight acres of undeveloped land between Euclid Avenue and the Nickel Plate rail line. The area immediately surrounding the parcel was also undeveloped. From a larger view, Euclid was a section of metropolitan Cleveland which, since early in the twentieth century, was experiencing the industrial growth generated by the automobile and the demands of World War I. In 1917, for example, the new Cleveland Tractor Company built an extensive plant near the Nickel Plate. But most of the village was still farm land at the time.⁸

By the mid-twenties industry and investors like Ambler Realty had purchased most of the farm land between the two railroads. They bought it against the day when it might be developed into factory sites which would enjoy the important advantage of immediate access to the adjacent railroads and to Euclid Avenue.

While Ambler was waiting for its investment to ripen, in the spring of 1922 Charles X. Zimerman, a former paving contractor, brigadier general in the United States Army, and now Euclid's mayor, appointed a commission. Under the authority of Ohio's new zoning enabling legislation, he instructed it to investigate and report on a zoning ordinance for the village. One of the commissioners was James F. Metzenbaum, a Cleveland lawyer, long-time resident of Euclid Avenue, and the village counsel.⁹

During the next half-year the commission met frequently. In Zimerman's words, it aimed "to make an effort to keep Euclid Village as free from unsanitary conditions as possible, and to locate those unsanitary conditions in the segregated district, or as nearly as possible."¹⁰ As if to stress his understanding, if not his apprehension, of the limitations in the police power grant, the mayor claimed that the commission had but one interest. "During all these many sessions that lasted for those many months, as to the relationship of the proposed map and ordinance to the safety, health and general welfare of the municipality, the health and welfare of the

community was really the only question that was taken into consideration, and it was only along those lines that this Ordinance was gotten up and this map made out.”¹¹

Part of the preparation involved village pulse-taking. Metzenbaum said that “each protester who came to protest was apparently looking after his own land. Most of them said that they weren’t interested in anything else but their own pieces of property, regardless of the health, and so forth.”¹² The commission also sought out the views of a larger community. It took the advice of experts who were conversant with zoning developments across the country, got copies of ordinances from a number of cities, and “secured the primer that is issued by Mr. Hoover’s department at Washington . . .”¹³ Village counsel-commissioner Metzenbaum specifically referred to New York’s as one of the big city ordinances consulted. He put particular emphasis on the “valuable report of the New York Commission on Height and Area Use . . .”¹⁴ Sensitized as a lawyer to the fact that land-use controls were the great undecided constitutional questions under zoning, he emphasized his belief that “the ‘use’ provisions [were] more closely related to and more intimately connected with the health, safety and general welfare of the community than were the ‘area’ and ‘height’ provisions . . .”¹⁵

In November 1922, Euclid, still largely farm land, adopted a comprehensive zoning ordinance. The entire village was placed under the same intricate system of controls first applied in New York—use districts, height districts, and area districts. The hierarchy of uses ran down through the single-family-dwelling district (U-1), two-family dwellings (U-2), and apartment houses (U-3) until it reached the generally unrestricted manufacturing and industrial operations at the bottom (U-6). In what was now the usual cumulative pattern, each “lower” use district permitted the “higher” uses as well as its own special group of them.¹⁶

After a preliminary skirmish, in which these original classifications were relaxed somewhat in Ambler’s favor, the real estate outfit’s parcel was zoned into three use districts. The Euclid Avenue frontage was restricted to two-family dwellings (U-2) to a depth of 150 feet. In the next forty feet to the rear apartment uses (U-3) were permitted. The remaining strip, which ran back to the Nickel Plate and was most of the parcel, allowed industrial uses (U-6).¹⁷

In May 1922, Ambler started suit in the United States District Court

for the Northern District of Ohio against the Village of Euclid and its inspector of buildings, Harry W. Stein.

The grievance was simple. The Ambler Realty Company said that the use zoning of its land under the new ordinance cut its value from ten thousand to twenty-five hundred dollars an acre. For the frontage along Euclid Avenue, the loss supposedly involved a drop from one hundred and fifty dollars to fifty dollars a front foot. Among other things, it claimed that the ordinance violated its federal constitutional rights embodied in the Fourteenth Amendment by depriving it of property without due process of law.¹⁸

The facts out of which the Supreme Court of the United States constructs landmark cases fit no grand pattern. Certainly a real estate investor's complaint of the loss of several hundred thousand dollars is no more pedestrian than many others which have yielded important law.

Metzenbaum defended the case for the village. Newton D. Baker represented Ambler. Baker came out of the same period which had been formative for Bassett and other important municipal reformers early in the century. A graduate of Johns Hopkins with a law degree from Washington and Lee, Baker practiced in Cleveland after a brief period in his native West Virginia.

He began public life under the auspices of Tom Loftin Johnson, the mayor of Cleveland from 1901 to 1909. Johnson had made a fortune out of street railways. On the recommendation of a train conductor he bought a copy of Henry George's *Social Problems* from a peanut butcher. As Lincoln Steffens reported, Johnson read it, went to his lawyer and told him: "I want you to answer that book for me. I can't. And I must. For if that book is right I am all wrong and I'll have to get out of my business."¹⁹ Like a misfocused Horatio Alger tale, he sold his monopoly, went into politics, and became "perhaps the most outstanding city executive America has produced . . ." ²⁰

Baker served as city solicitor in the Cleveland reform government. He was twice elected mayor. His reform administration obtained a new home rule charter for the city and built a municipal power plant. In 1916 President Wilson appointed him Secretary of War. He is immortalized in a photograph in which he is wearing a blindfold as he reaches into a fishbowl to draw the name of the first draftee under the Selective Service Act of 1917. In the midst of this difficult service he contributed the foreword to

Our Cities Awake, a now obscure work about America's urban progress.

Still steeped in the high hopes of his generation's despite the awful price the war was exacting, he wrote that "the progress of American cities in the last twenty years in strength of general purpose and in the effective reorganization of the processes of community cooperation is probably the most significant development in recent American history . . . Forethought has been made the city builder instead of Accident, and the effect of this upon the life of city dwellers is apparent to those who have watched the march of events."²¹

He returned to Cleveland, and by the time of the *Euclid* case he represented a number of large business clients. During the 1930's he was to break with President Roosevelt on the issue of the constitutionality of the Tennessee Valley Authority.

It is a principle of the adversary system of Anglo-Saxon law that professional representation of a client is not necessarily a personal commitment to the client's cause. The premise is one which most laymen and too many lawyers do not appreciate. It is therefore in no sense a criticism to find a special irony in the fact that a lawyer with incomparably deeper involvement in the cause of urban reform than the village counsel should have carried the responsibility for convincing the district court, and eventually the Supreme Court of the United States, that a major achievement of that movement was unconstitutional.

The trial of the case in the Ohio federal court was a singularly routine affair. In fact, it was not a trial in the conventional sense of a courtroom contest but a series of pre-trial examinations of witnesses. The trial judge got their testimony as a summarized, dried-out record, a record to which he was exposed by reading rather than by observing and listening to the testimony of live witnesses in the courtroom. Nothing of importance was lost in this dehydration process.

The only important contest about the facts was little more than a haggle over price. Because of the zoning of its sixty-eight acres, was Ambler suffering the amount of loss it claimed, less, or none at all? Through a number of real estate brokers Ambler and the village put conflicting proof that the industrial value of the land ranged from an average high of some fourteen thousand dollars an acre to a low of three thousand an acre.²² No one on either side testified that there was a ready market for industrial land in *Euclid*. Indeed, some indicated that there was no market at all in view of the glut of open land in the village.²³

Harry W. Stein, the defendant inspector of buildings, was a man of other parts as well, a former real estate agent and now also overseer of the village's streets, public grounds, and garbage collection. He had firm views on Euclid's real estate situation. Only suckers, he said, could be sold factory sites there. "All this stuff is for sale, there ain't anything that you can't buy."²⁴ Most of the land where Ambler had its parcel "is owned by speculators, hardly any of it is owned by any of the old owners in the Village. These speculators also own the Euclid Avenue frontage . . ."²⁵ In his view, the Ambler site was worth more for homes than factories.²⁶ As a matter of fact, the village claimed that in the four years previous to the trial, hundreds of homes but not a single factory had been built. Since the zoning ordinance had been passed in the previous year, there had been a million dollars' worth of home construction.²⁷

Ambler argued that most of the land in its strip was adaptable to industrial use. The desirable residential area of the village, it said, was south of Euclid Avenue on the elevated "Ridge" where homes already existed. Even though it insisted that industrial use was the best use of that land, not too long before the suit it had been selling off lots very close to the sixty-eight acres. Those lots had been sold subject to private deed restrictions permitting only single residences on them. The village deplored the effect that industry would have upon these homes.²⁸

There was disagreement about the reasons behind the zoning ordinance. If one believed the preface to the ordinance, the village was in an emergency, its health, safety, and general welfare were threatened by property uses "inconsistent" with its proposed development plan.²⁹ It wanted to preserve its character.

Ambler, on the contrary, argued that the legislation was a subterfuge. Its actual purpose was to preserve, not character, but "the ideas of beauty officially entertained" by the village legislature and to prevent those "offensive to [its] . . . eccentric and supersensitive taste . . ."³⁰ Obviously aware that aesthetics was not then a proper basis for exercising the police power, the village denied an intention to legislate for the "mere purpose of preserving the idea of beauty . . ."³⁰

There was no more candid witness in the proceeding than C. A. Witzel, a real estate operator with extensive experience in locating industrial building sites. Like Ambler, he had an interest in some land in the village. While he placed a very high estimate on the value of Ambler's land if sold without zoning restrictions, he was quite sensitive to the character

of the area. "Up until very recent years, the Village of Euclid was a rural district, filled with trees, shrubbery, and a very beautiful, quiet little village, parts of it." ³¹

What did he think about zoning's effect on health, comfort, general welfare? Having in mind the zoning of nearby Cleveland Heights, he thought the question might be answered both ways. A homeowner within a residentially zoned district could feel safe against "any objectionable features near him in a reasonable time—in his life." ³² But while it stabilized or even increased residential land values, the effect of such a zoning classification "is very limited as compared to the increase in value due to unrestricted uses." ³³

Witzel drew within himself a distinction whose formulation has been a perennial American exercise. He could look at the problem from what he called a "sentimental standpoint" or "purely from the dollars and cents standpoint." ³⁴ In the former, zoning was desirable. In the latter it was not. The conclusion was simply that unrestricted land was worth more than zoned land.

What about sentimental considerations?

I wouldn't want my children to live on a street that was unrestricted, because we all have the swelled head. Our children are finer than any other children that ever lived. We have inflated ideas, you have it and I have it; we have no right to have it. I am too poor to have inflated ideas, but I have them. The street that is unrestricted would not have as high a value for strictly residential purposes as one that is restricted . . . I wouldn't just as leave be up against a factory as not, not on your life. As I say, I have a swelled head, and all those that have been educated to a desire for betterment feel that same way, and I will admit that when you realize those desires you have better living conditions. ³⁵

There is something noteworthy about a man who wants to live in a house without a prospect on a factory selling real estate which will give the house of the same kind of man a prospect on a factory. Such was the state of affairs, for Ambler had only recently sold off lots with residential deed restrictions and now wanted to sell adjacent lands for factories.

The testimony of Robert Whitten was the closest any witness came to suggesting that perhaps zoning as a planning device was a means of harmonizing such an inconsistency. Whitten was one of those men who, by the early twenties, had made zoning consultancy into a busy professional

practice in many eager cities around the nation. By the time of the *Euclid* trial, he had worked on the 1916 Resolution and had consulted in Atlanta, Indianapolis, Buffalo, and Providence. He was a constant colleague and advisor of Bassett, who thought Whitten had "contributed far more to the upbuilding of zoning in this country than I did." ³⁶

The village called Whitten as its witness. The reason is not clear. Such testimony as he gave did not go to the narrow question of value. He did not know whether Ambler's land was worth more for industrial or residential use.³⁷ His contribution to the facts amounted to little more than a statement that zoning was sweeping the nation because unsegregated industries caused great waste, economic loss, and uncomfortable, unhealthy living conditions in residential areas.

On the issue of price, his cross-examination brought this colloquy: "If all of the territory between Euclid Avenue and the Nickel Plate tracks had a market value about three times as much for industrial purposes as for residence purposes, would you say that would be a vital consideration in determining whether any part of it should be zoned against industry or business development?" He answered: "I think that would be a vital consideration of any undeveloped area." ³⁸

That was, of course, the meat of Ambler's argument. It hardly strengthened the village's case. To repair some of the damage, Whitten then said that "Whenever the public good is to be gained, the interest of the public health and safety and welfare more than counterbalances the private individual." ³⁹ That was the extent of the testimony on planning and what it had to do with the conflict.

Factually, there was nothing more to the case.

In January 1924, the trial judge struck down the Euclid zoning ordinance, holding that it violated both the Ohio constitution and the Fourteenth Amendment of the Constitution of the United States. He decided that Ambler had been denied its property without due process of law.

The author of the opinion was United States District Judge David Courtney Westenhaver, yet another American who had left the country for a life in the city. Born on his father's farm in West Virginia, he divided his early years between working there and getting an education at a schoolhouse five miles away. He attended law school at Georgetown University, began practice in West Virginia, and in 1903 moved to Cleveland where he formed a firm. His partner was Frederick C. Howe, the

ardent municipal reformer and fecund writer who had done so much during the Progressive era to publicize urban planning and the achievements of German cities.

In 1905 Cleveland hired Westenhaver as its special counsel to defend lawsuits attacking the three-cent traction fare, an important measure in Mayor Johnson's reform administration. In his office he kept a bust of Abraham Lincoln and a photograph of Johnson. In 1911 he was appointed to the Cleveland Board of Education and served as its president in 1914-1915, during which he successfully opposed an attempt to unionize school-teachers.

In 1917 President Wilson nominated the fifty-two-year-old lawyer to the federal judgeship to fill an eight-month vacancy left by the elevation of Judge John H. Clarke to the Supreme Court of the United States. Wilson's appointment ended a political deadlock over the seat. Organized labor had opposed Westenhaver because of his stand on unionizing the teachers. Despite this and other opposition, he had the decisively important backing and sponsorship of Wilson's Secretary of War, Newton D. Baker.

Baker and Westenhaver were lifelong friends. They were both born in Martinsburg, West Virginia. As a boy, Baker visited the Martinsburg courts where he admired young Westenhaver's professional skill. Baker is reported to have been responsible for persuading Westenhaver to move to Cleveland in 1903 because "the city was the place for a rising lawyer."⁴⁰ When Westenhaver was retained in the 1905 traction fight, he was assisting Baker who was then running the city's law department as city solicitor. Upon Westenhaver's death in 1928, an editorial eulogy in the *Cleveland Plain Dealer* remarked upon the parallels between the careers of the two men.⁴¹

If Judge Westenhaver had any difficulty in deciding *Euclid*, none of it showed through his opinion. With good reason, he rejected much of the testimony as either weightless or unrelated to the issue. On the pivotal question of the value of Ambler's land, he was certain that zoning would mean a loss of "several hundred thousand dollars."⁴² The conclusion rested on an assumption insistently repeated in the opinion. The evidence, he said, was that Euclid Avenue was a great business and commercial street in metropolitan Cleveland. This was "its natural, obvious, and ultimate use within and beyond the village of Euclid."⁴³

The adjectives had a familiar ring. They were the descriptions as well

as the prophecies which the New York commissioners had heavily applied to Fifth Avenue ten years earlier. In that same bundle of terms the commissioners had found justification for zoning as a protective device. Now a federal judge reached into it and said that he found zoning an instrument of destruction. However vague, the commissioners' and the judge's thinking had one thing in common, a belief that the growth of an urban area somehow comes about because of a push of forces which look more like Grecian fate than American design. Why was a gasoline station on Euclid Avenue more natural than a single dwelling? How could any development in an American city be ultimate?

The obvious answer is more obvious than revealing. Perhaps the judge was really saying the same thing as the commissioners, nothing more complicated than that the destiny of such places ought to be shaped by decisions which make sense. Zoning made sense on Fifth Avenue but no sense on Euclid. If so, then there was the question of how to tell what made sense. In both cases, it finally came down to a narrow test of economic value, not the broad concepts of public planning. Zoning would preserve values on Fifth Avenue but destroy them on Euclid.

There was nothing novel about the standard. Only the setting—a new institution—was. Both the *Euclid* court and the New York commissioners grappled with the same abstract problem, the economic point beyond which constitutional guarantees would not permit the application of the police power. It was the problem which gave the New York draftsmen so much anxiety and had Bassett crisscrossing the nation in an effort to build a backlog of mood-setting legislation.

Judge Westenhaver wrote that the only way the village could take Ambler's property was by condemning and paying for it under the power of eminent domain. The trouble with the case, he said, was that the village counsel did not understand the meaning either of property or of police power. Citing the authority of the Supreme Court of the United States, he wrote: "There can be no conception of property aside from its control and use, and upon its use depends its value."⁴⁴

However analytically incomplete it may be, this was a settled and exhaustively cited proposition. For zoning, it could cut both ways. Yet there was something different and ominous in the discussion of the police power. As courts had held so frequently and so long, there were no hard and fast limits to the power. Judge Westenhaver felt the same way. This

too was not necessarily an argument against its application to zoning. But in calling defense counsel's attention to his error, Westenhaver suggested that the village was equating the police power with the sovereign power, but there was no such equation. The village seemed to think "that whether one power or the other is exercised depends wholly on what the legislative department may see fit to recite on that subject. Such, however, is not the law. If police power meant what is claimed, all private property is now held subject to temporary and passing phases of public opinion, dominant for a day in legislative or municipal assemblies."⁴⁵ It was in the creation of just such public opinion that the zoning circuit-riders were placing their hopes for zoning's triumph in the courts.

The intriguing question about the decision is why it went as far as it did when it struck down the entire ordinance. American courts have traditionally paid at least lip service to the respect due acts of legislatures. Rather than nullify the entire ordinance, supposedly the product of careful study, exhaustive preparation, and sober legislative decision, why not simply find that the use classification on Ambler's land was "unreasonable" and therefore unenforceable? The village could have cured the flaw by amending the classification while retaining whatever were the benefits of the rest of the law.

The opinion suggests the answer. Judge Westenhaver had an apparent conviction that in zoning's crucial principle of use segregation there was a fatal constitutional flaw.

[The object of the ordinance was] to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic service. Aside from contributing to these results and furthering such class tendencies, the ordinance also has an esthetic purpose; that is to say, to make this village develop into a city along lines now conceived by the village council to be attractive and beautiful.⁴⁶

The voices which speak to a trial judge make identical announcements to the lawyers trying the case before him. In persuading the judge to a particular view of the law, each lawyer has a very simple task. He need only convince the court that they hear the same thing. The trial judge's task is basically the same, but he has a different audience, an appellate court. While high C at La Scala is high C at the Metropolitan Opera House, one of the reasons law is even less a science than music is that however intently they listen, judges and lawyers rarely hear the same thing at the same time. The serious complications set in when no one hears any voices of authority.

Judge Westenhaver heard none from either the Supreme Court of Ohio or the Supreme Court of the United States. Neither had yet decided the question of zoning's constitutionality. Such appellate law as there was taught him that the most drastic use of the police power which still withstood the test of constitutionality—rent control in New York and the District of Columbia—was only a temporary expedient to meet the emergency of World War I.⁴⁷ Justice Holmes had written the majority opinion in the two cases which decided that.

Later (1922) in *Pennsylvania Coal Co. v. Mahon*⁴⁸ (with Holmes again writing for the majority) the Supreme Court stressed the limitations of the rent control cases. Judge Westenhaver put particular emphasis on the authority of the recent decision in *Mahon*. His reliance seemed to be well founded.

In *Mahon* the Pennsylvania legislature had passed a statute prohibiting coal mining which caused cave-ins or the collapse of streets and buildings. Residents in Scranton's anthracite region attempted to enjoin a coal company from digging under their property in such a fashion as to remove the supports which kept the property from collapsing into the mine. The company attacked the statute as an unconstitutional deprivation of its property. The Supreme Court of Pennsylvania held that it was a proper exercise of the police power. The Supreme Court of the United States reversed the decision, ruling the law unconstitutional. Justice Brandeis dissented.

Everything depends on how one begins. For Holmes, the beginning was very small. "This is the case of a single private house."⁴⁹ He said that the question in the case was whether "the police power can be stretched"⁵⁰ so far as to reach the statute. While he agreed that government had some

power to diminish property value without having to pay for it under eminent domain, the power was limited. "One fact for consideration in determining such limits is the extent of the diminution,"⁵¹ and that depended on the particular facts.

Since *Mahon* was the case of one house, even if the same kind of damage was being done to other houses in other places, the "damage is not common or public" but relatively small. Yet "the extent of the taking is great . . . To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does."⁵²

If the case was so narrowly confined that it involved no more than one house, what was it doing in the Supreme Court of the United States? With overtones of annoyance that so little should involve so much, Holmes suggested that various Pennsylvania groups had shown such widespread interest in the question that the Court felt bound to consider it. While this explained why the case had gone so far, a "strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."⁵³ The question, the perennial question, was one of degree. General propositions did not answer it. *Mahon* simply went too far on its facts.

Starting differently, the Brandeis dissent disputed the majority's result. This, it argued, was not merely the case of a single home but an examination of a broad statute which showed concern for the impact of coal mining under cities and its effect upon streets, schools, and hospitals. It was "obviously enacted for a public purpose."⁵⁴ As far as diminished values were concerned, "values are relative."⁵⁵

Faced with having to decide a novel question in *Euclid* a trial judge in the early 1920's would not have had to strain to find impressive instruction in *Mahon*. While no zoning ordinance was involved in *Mahon*, it was a police power case, and it did present a set of facts which invited sharp contrasts. The connection between the Pennsylvania law and the threat of collapsing city streets appeared to be much closer to the traditional purposes of the police power than the use of regulations being imposed on Ambler's land. Yet the connection was not close enough to save the mining statute from a fatal constitutional goring.

In their own negative way, good losing arguments are also important.

Some of Brandeis's dissent was made of decisional law which was crucial to zoning's continued life in the courts. The Supreme Court's 1909 holding

in favor of Boston's height controls was a holding that the police power was available to impose one of zoning's basic controls. Despite *Welch v. Swasey's*⁵⁶ settled acceptance, however, it did not persuade the majority in *Mahon*.

If cases like *Welch v. Swasey* did not persuade Judge Westenhaver either, he was moved not only by *Mahon* but by *Buchanan v. Warley*.⁵⁷ In the latter case, in 1917, the Supreme Court overturned a Louisville, Kentucky, ordinance which zoned the city into white and Negro residential areas. The legal theory of the decision was that the ordinance infringed the constitutional right of the white seller to select his buyer.

Even though racial zoning failed in *Buchanan*, Westenhaver thought it was a closer case than the one he had to decide.

It seems to me that no candid mind can deny that more and stronger reasons exist, having a real and substantial relation to the public peace, supporting such an ordinance than can be urged under any aspect of the police power to support the present ordinance as applied to [Ambler's] property. And no gift of second sight is required to foresee that if this Kentucky statute had been sustained, its provisions would have spread from city to city throughout the length and breadth of the land. And it is equally apparent that the next step in the exercise of this police power would be to apply similar restrictions for the purpose of segregating in like manner various groups of newly arrived immigrants. The blighting of property values and the congesting of population, whenever the colored or certain foreign race invade a residential section, are so well known as to be within the judicial cognizance.⁵⁸

Bounded conceptually on all sides by what was still the great sanctity of property, he believed that there was a greater connection between health, safety, and general welfare and racial segregation than in the separation of a tractor works from a man's neighborhood. And in neither case did he find enough of a link to satisfy the Constitution.

The 1916 Resolution made no impression. He dismissed it by saying that its validity was assumed rather than decided. As far as zoning developments in the rest of the nation were concerned, the growing judicial climate favorable to zoning meant no more to him than the 1916 Resolution.⁵⁹

Sixty-eight acres in a Cleveland suburb was no statelier a setting for the review of the high court of the United States than the Mahon place in Scranton. Yet, as in *Mahon*, more could be involved. Judge Westenhaver sensed that when he wrote at the outset of his opinion: "This case is obviously destined to go higher."⁶⁰

Unlike the Holy Roman Empire, the Supreme Court of the United States is precisely what its name suggests. In the accuracy is something of the awesome character of the institution.

Nearly a century before the Village of Euclid appealed its case to the Court, Tocqueville concluded that "a more imposing judicial power was never constituted by any people."¹ No American court seems quite so remote, yet this unique tribunal can make its power felt as immediately as any in the land. It is a very peculiar blend. Paradoxically, just because it enjoys such an enormous jurisdiction which can touch every citizen and any root or branch of his governments, proceedings before it have a special intimacy unknown in the rest of the American judicial system. In no other forum of the United States are federal, state, and local authorities so visibly and finally called to account for their conduct; the waters of great rivers parceled out among competing states; the destiny of vast enterprises shaped; or the fate of the humblest citizen decided with such finality. "We are very quiet there," Justice Holmes said, "but it is the quiet of a storm centre . . ." ²

One has but to listen, as Tocqueville did, "[when] the clerk of the court advances on the steps of the tribunal and simply says: 'The State of New York *versus* the State of Ohio,' " ³ or cries out the names of the weak or mighty litigants, to sense the sweep and detail of its work. Simply to have cause in its forum is statement enough that something of national importance ought to be at stake.

By the time *Euclid* was called to the bar on January 27, 1926, the case had taken on national overtones. Alfred Bettman, a Cincinnati lawyer who

had an important role in the case, suggested that "There is ample ground for the suspicion that the Ambler Realty Company, while genuinely the party plaintiff, still represented a larger group seeking to destroy the zoning movement, and that the Euclid ordinance was chosen for this purpose because of certain weaknesses which were felt to inhere in its provisions." ⁴

The Westenhaver decision, with its stress on the great loss in the value of Ambler's land, seemed to justify the realtor's strategy. From the zoning movement's point of view, *Euclid* was a weak and unappealing case to defend. To believe that Ambler sustained no loss of land value, as the village had argued, one had to believe that industrial land in that area would sell for no more than residential land. But in the face of such disarmingly frank testimony as Witzel's, that was simply too much for a fact-finder to accept, especially if he also believed in the inexorable industrialization of Cleveland's eastern side.

Faced with no zoning ordinance, the prospect of heavy industry rolling across the village, and the probability that the Westenhaver decision would be cited around the nation to prove that at least the land-use controls in zoning were unconstitutional, the village decided to appeal the judgment. James Metzenbaum, the village counsel who had drafted the ordinance and served as the first chairman of the board of zoning appeals that it set up, handled the case. ⁵

Metzenbaum had been practicing law in Cleveland for some twenty years, but when he took the first steps to prosecute the appeal he had not been admitted to the bar of the Supreme Court. ⁶ This was not unusual. Even in a lifetime of practice, most lawyers are not likely to have a matter that goes that far. If they do, they often decide, in the client's best interest, to bring in extensively experienced appellate counsel familiar with the demands of Supreme Court practice rather than risk arguing the cause in such a lofty forum.

Many are the reasons that can lead a lawyer to make his first appearance there. The most practical is usually the prosaic fact that his client cannot afford the fees of experienced appellate counsel. There is also the magnetism of the institution. The prospect of arguing before a court which handles the nation's most important judicial business is heady. As long as it does not visit catastrophe on the client's cause, it is a fulfilled dream of glory which can transform hundreds of drudging hours of preparation into one all-redeeming moment which the lawyer will never forget. Quite frequently

he will never let anyone else forget it either. The power of the Supreme Court to encourage such dreams is one measure of its mystique.

The scope and variety of causes argued in the Supreme Court appear upon one side of an elaborate medallion. On its reverse stretches the strikingly varied cavalcade of lawyers who bring them there. From the lawyer's and the client's point of view, the Court is as democratic as any in the nation. Like the kind of case it decides, its qualifications for admission to practice neither punish the poor litigant and his modest counsel nor reward the powerful one with his high-priced professional advisor. As a result, on practically any day of argument there one may see many of the faces and hear many of the voices which diversify American civilization and its legal profession. Oral arguments of remarkably uneven quality follow upon each other's heels. The smooth and distinguished presentations or smug fatuous prattlings of the Wall Street lawyer can be heard in contests which sound of voices from rural Alabama or the Great Plains, voices which may carry the muscular prose and the persuasive horse sense of the wise country lawyer or the stunning ineptitude of a county courthouse type whose entire knowledge of the law is in the pocket of the vest he should have worn to court that day.

An important part of the history and mythology of Supreme Court litigation is made and some of it written by lawyers of such wide-ranging backgrounds and talents. On several occasions, James Metzenbaum favored posterity with a kind of appellate chronicle of *Euclid*. His most extensive account appears in his treatise, *The Law of Zoning*.⁷ First published in 1930, the *Euclid* narrative of that edition has the special flavor of an American art form associated with the era of the landmark case, the serialized thriller.

When Ambler started suit in Ohio, Metzenbaum claims: "It was recognized from coast to coast, that a defeat in this case, would cause all zoning ordinances in successive order throughout the land to fall, like a row of dominoes stood on end."⁸ And when Judge Westenhaver gave judgment for Ambler, the tocsin sounded anew for the forces of progress.

This decision was a challenge to American citizenry.

It was no longer a case involving *Euclid* Village alone.

It was an order that would have halted the thirty million people then living in zoned territories.

It became a question whether the constitution was meant to so hamper

and restrict the American people, or was intended to protect them in their right to make their cities, large and small, livable and tenantable for the present as well as for the coming generations.⁹

Although it may involve high drama, combat by judicial proceeding usually develops with a unique torpor. It was two years before the Westenhaver decision reached oral argument in the Supreme Court. During this period counsel were preparing their appellate briefs. The "short and concise brief"¹⁰ from the village, running to 142 printed pages, swept much beyond the confines of the case which Judge Westenhaver had decided. Such strengths as it mustered came from setting the Euclid ordinance in the context of a national movement. In this, New York occupied a central place.

Village counsel took special steps to see that the Court got copies of both the 1913 and the 1916 Reports before the oral argument. At Metzenbaum's request, Edward Bassett sent two copies to the Clerk of the Court to be held until oral argument.¹¹ In addition, Metzenbaum had Robert Whittten send on four more copies.¹² Metzenbaum was therefore three short of the number of reports necessary to supply all of the justices with a copy before the argument set for January 1926. His concern to have them in the hands of the entire Court before the argument is an important clue to the weight he attached to New York's effort.

In fact, the village of Euclid and the city of New York had a common bond which could have a direct bearing on the appeal. In his brief Metzenbaum wrote: "It may not be amiss to point out that the Euclid Ordinance is almost an exact duplicate of the New York City Zoning Ordinance, except as to local names and locations."¹³

The arguments of the New York commissioners, and the supporting statements and reports they had assembled, filled a good portion of the village brief. There were also repeated references to the national movement, the work of Hoover's Department of Commerce, and the model zoning enabling act. "So that, as this brief is being dictated, there is not a part of the country—from the conservative and careful East to the freer Pacific States—which has not already witnessed the benefits and the health, safety and general welfare results which are to be derived from zoned municipalities."¹⁴

The question is mother to the answer. If the issue in the case were woven tightly into such a context, a justice inclined to decide against the

village might hesitate and finally vote favorably because he did not wish to tear the fabric of American urban progress. For the village:

[The] issue is really freed from the question of the reasonableness or unreasonableness of the particular restriction and the subject really narrows down to the sole and completely *legal* and *fundamental* question as to whether there be a *constitutional power* to enact such ordinances as the one in question.

Frankly, this is the question which countless people who live in territories now zoned, are waiting to be decided.¹⁵

The great number of practically identical zoning ordinances and enabling acts around the nation supplied a comforting argument. "These legislative bodies . . . would not have enacted the respective Ordinances or Enabling Acts if they had not believed the same to be in conformity with their respective state constitutions as well as in keeping with the Federal Constitution itself." ¹⁶ For the statistics as well as the text of its ordinance, Euclid had Bassett to thank.

But Bassett's labors of a decade were about to be tested in what was an unfortunate case. Baker's brief for Ambler bore down hard on the weaknesses. The issue it asked the Court to resolve had nothing to do with millions of Americans waiting breathlessly to hear the judgment on the fate of a great progressive movement. It was, instead, a very narrow problem: "the real question in this case is whether Ordinance No. 2812 of the Village of Euclid, as amended, is a valid police regulation of the property of the appellee in the village." ¹⁷

In a lower court it might have been an appealing statement of the question. But the difficulty with confining the case to sixty-eight acres in a Cleveland suburb was simply that it was now in the Supreme Court of the United States.

Ambler's brief struck at motives behind the ordinance. It was an attempt to impose one group's notion of beauty upon another. It was also socially divisive and unreasonable.¹⁸

The territory south of Euclid Avenue, which is wooded hillside, and the territory north of Lake Shore Boulevard . . . are obviously the most healthful and desirable residence portions of the village, yet from both of these all are excluded except those who are able to maintain the more costly establishments of single-family residences. . . . No apartment house or two-family house can be erected in either, and yet the men, women and

children who, for reasons of convenience or necessity, live in apartment houses or in the more restricted surroundings of two-family residences are of all others most in need of the refreshing access to the lake or the better air of the wooded upland. By the obvious necessities of the case the territory between the two railroads will be industrially developed. All the people who live in the village and are not able to maintain single-family residences . . . are pressed down into the low-lying land adjacent to the industrial area, congested there in two-family residences and apartments, and denied the privilege of escaping for relief to the ridge or lake.¹⁹

Not only did Ambler see no reason behind the use classifications, but the lot area requirements were senseless too. "The lots on which the fewest people live are required to have the largest free area for light and air while those in which the most people live have minimum requirements for ventilation and light."²⁰

Euclid's brief talked about the "philosophy of zoning," but Ambler refused to be drawn into that. To the extent that the Baker brief said anything, it was to protest the seminal assumption of planning, that a municipal legislature could "measure, prophetically, the surging and receding tides by which business evolves and grows, to foresee and map exactly the appropriate uses to which land shall be developed and the amount necessary for each separate use . . ."²¹

Such wisdom, Ambler argued, "not only does not exist in municipal councils but does not exist anywhere."²² The law was being used to do nothing less than "embed a fly in amber,"²³ by staying the forces which cause urban growth. If Metzenbaum tried to leave the Court with the options of being either for or against progress, Baker was asking it to choose between two views of man's capabilities. The very kind of intelligence upon which urban planning was supposed to depend was just what Baker insisted could not exist.

Predicting the outcome of a case is often an impossible effort. Bench and bar do it constantly. In an important sense it is at the heart of all legal advice. It is also embedded in a lower court's opinion of what the applicable law is and how it affects the case in hand. There are no more than three statistical certainties about the effort. Someone must win, someone must lose, and the judgments in most cases appealed are affirmed. With the *Westenhaver* decision, Euclid's chances had thinned out badly.

Whatever anxieties Metzenbaum suffered before the decision were aggravated during the appeal. The village had lost because it was told it

had tried to do something radical. Although he made much of the remarkably heavy tide of zoning running throughout the nation, Metzenbaum took pains to deny that there was really anything novel about zoning law. It was a mere "composite" of law that had long been settled. It could be found in the line of common law and statutory regulations of nuisances, in the building and tenement house codes, and the ordinances which had established building and height districts in a number of cities.²⁴

As the issue was joined in these briefs, somewhere between the extremities of their positions of radical and conventional law was the vague shape of the planning idea. If the Supreme Court agreed with the *Westenhaver* decision, the Fourteenth Amendment was about to be applied to destroy what was claimed to be the most important planning instrument in the nation. It seemed that there would be no public power with which to grab hold of accelerating growth if the principle of use segregation were to die an early death. But if the *Westenhaver* decision were reversed, planning interests might claim a great victory, even if the Supreme Court never talked about the subject nearest the planners' hearts.

The oral argument was held on January 27, 1926 in the old Senate chamber of the Capitol before a bench of eight members of the Supreme Court. Justice Sutherland was absent that day. The Court sat there from 1860 to 1935, when it moved to the present Supreme Court Building whose architect, Cass Gilbert, had done the Woolworth Building. In the colonnaded, semicircular courtroom of the Senate chamber, Clay, Calhoun, and Webster had once debated some of the great issues in American history. Before the Court sat in the chamber, a visitor's gallery had been cramped close to the domed ceiling. In relaxed moments, senators used to pass up refreshments at the ends of long sticks to their visiting friends.²⁵ The gallery was removed during the Court's occupancy. A long bench ran across the straight side of the room. Behind and above the seat of the Chief Justice spread a gilded eagle capping a Romanesque doorway through which the justices entered to take their seats in solemn ritual. As if to emphasize the closeness of the Court to American life, the bench was barely elevated from the chamber floor. The distance between lawyers in the well of the courtroom and the seated justices was close enough to permit an atmosphere of almost conversational intimacy in cases involving such transcendent issues as the nation's money, the separate but equal doctrine in race relations, the management of nineteenth-century industrial

growth, and the power of the states to control the conditions under which Americans labored.

There is no official transcript or any other extended account of the *Euclid* argument. Metzenbaum recorded only two events.⁴⁰ With an anxious nation awaiting the outcome of the case, he says that three minutes of his allotted one hour were used in handling Chief Justice Taft's question about the difference between realtors and real estate men. Justice Holmes suggested that one received more money than the other. Metzenbaum added that it was the difference between a statesman and a politician. He says that his rejoinder threw the rotund Chief Justice into "loud and unrestrained laughter, as he kept repeating: 'Pretty good! Statesman and politician—pretty good!'" The other event was Baker's alleged misstatement of the facts at the conclusion of his argument. This was supposed to have so "distinctly impressed" the Court that it gave Ambler's forces "an apparent flush of victory." The flush, thought Metzenbaum, was justified. He left the courtroom dejected, and there dawned upon him the realization "that the opposing forces were at the very 'gates of Paris' and that the vast army of zoned territory stood at the edge of defeat." Considering the fact that Newton D. Baker had risen to national prominence as the Secretary of War who administered the American army's contribution to Germany's defeat, it was probably an analogy which did not sit well with him.

Baker's argument gave his opponent a sleepless night in which he felt burdened with "the tremendous responsibility that was owing from me to the people throughout the country . . ." In this anguished state, village counsel decided that when he got back to Cleveland the next day he would telephone his Washington associate to request permission to file a reply brief to Baker's supposed misstatements. Time was reported to be critically important because, with Baker's damaging argument still fresh in its mind, the Court was going into recess to consider the case.

As meteorological fate would have it, the trip back home was delayed by a snowstorm. When morning came he was so far from Cleveland that the day would have run out before he could get a call through to Washington. Tossing court formalities into the blizzard, he reports that he drafted a telegram to the Chief Justice, wrapped it with currency, and passed it to a track worker shoveling snow from freight cars on a siding. The man sent it on to Washington. During the several ensuing days of silence, Metzen-

baum says he feared that his breach of formality might cause him to be stricken from the Court's roll of attorneys. But instead of disbarment, he got permission to file his reply brief. "Sometimes I have wondered if that 'statesman-politician' reply had not at least somewhat helped to win this indulgence."

He need not have wondered and worried. In the heat of combat he apparently had forgotten that five months before the badinage which helped save the nation, he had written to the Clerk of the Supreme Court asking permission to file a brief replying to Baker's. With characteristic promptness, the clerk had answered that he could.²⁷

A rather different kind of history, Robert A. Walker's *The Planning Function in Urban Government*, throws other light on *Euclid's* post-argument stage. It is through this book that the American planning movement receives heavy, perhaps decisive, credit for shaping the final result in *Euclid*. To read Metzenbaum's account of the case, it was a lawyer, not the idea of planning, that saved the day. For Walker, that idea and another lawyer, Alfred Bettman, are crucial.

According to Walker,²⁸ during the pendency of the appeal, the leaders of the National Conference on City Planning debated whether to file a brief *amicus curiae* in support of the constitutionality of zoning. Some felt that *Euclid's* case was so poor that the Supreme Court would almost certainly affirm the *Westenhaver* holding. Alfred Bettman of the Cincinnati bar was in the opposing group which was convinced that too much was at stake to remain silent. That view prevailed, and Bettman prepared a brief for the conference. Other *amici* went on the brief, the Ohio State Conference on City Planning, the National Housing Association, and the Massachusetts Federation of Town Planning Boards. They described themselves as "associations engaged in promoting city planning, including zoning."²⁹

What followed the planners' decision was an ironical aside on the planning of planners. About two weeks after the oral argument in the Supreme Court, Bettman wrote to the clerk inquiring whether argument had been held yet. He also wanted to know if it was too late to file his brief. He had been preparing it against what turned out to be an erroneous deadline. The clerk wired that it was too late but suggested that Bettman write to the Chief Justice describing his discomfort and the importance of the case to city planning. He wrote, and a little more than a month

after the first argument, the case was restored to the docket for reargument in October 1926. Bettman got leave to submit his brief.

Reargument in the Supreme Court is rare. Walker speculates that since Bettman's request was the only new element in what was by then an argued appeal being prepared for decision, it precipitated the extraordinary event. This may be true or not. The reasons for a court's actions might be discoverable elsewhere, but they ought to be sought first in its own explanations. These may not be complete, but at least they are authoritative. The Court never explained its order for a rehearing. After the first hearing, Walker writes: "It is understood that a divided court had decided against the validity of comprehensive zoning by one vote . . ." After rehearing, "one justice changed his vote . . ." ³⁰

What happened behind the closed doors of the Court's *Euclid* conference is, as it ought to be, privileged information. Of course, if the first vote went as Walker suggests, the sequence of events tends to put Bettman's contribution in a rather bright light. But perhaps the briefs and rearguments of Baker and Metzenbaum cut differently the second time. Such vagaries share a common urge to find a simple explanation for what is often an exquisitely complex process. For Metzenbaum, the lawyer as hero carried the day. For Walker, Bettman's persuasive plea for planning tipped the balance.

The *Euclid* opinion suggests a good deal for the latter explanation and nothing for the former. For reasons having to do with the fact that the lawyer-judge relationship is a rather complicated variation on that of teacher-student, courts do not usually attribute their thinking to the arguments of counsel. Certainly the *Euclid* court did not. But the opinion does show something of Bettman's influence.

The hand of an impressive lawyer shows through Bettman's brief. It was the work of a professional, then in his early fifties, who had accomplished much. A graduate of Harvard College and Harvard Law School, his interest in city planning arose during the ferment of the early twentieth century. He was heavily identified with municipal reform as city solicitor in Cincinnati. Apparently distressed by the social and economic waste of bad government, he developed an acute awareness of the need for comprehensive city planning.

After service in the Department of Justice during World War I, he grew deeply involved in city planning. It became the dominant interest of

his life. He played major roles in drafting the Model Standard Zoning Enabling Act and later made an important contribution to the administration of American criminal law. In 1944, the year before his death, he wrote what proved to be his life's creed. "One of the highest of moral qualities is the capacity and the willingness that the long-run community interest shall be studied and formulated and permitted to have an influence. The future belongs to the city which plans for it; and the quality of life will be determined by the quality of that planning, and the quality of that planning is the best evidence of the moral quality of the community."³¹

Bettman, according to the judgments of a distinguished lawyer and a justice of the Supreme Court, had a mind quite exactly like that of other reformers who made zoning in its early years: practical, modest, and disinterested in either theory or abstraction.³² It is a description of his brief as well. Drawing generously upon the work of the New York commissioners and upon national developments, he fulfilled the appellate lawyer's greatest opportunity. He was an instructor who was able to marshal his materials systematically, extract convincing arguments from them, and then help the Court to find a way through the problem before it. With encyclopedic thoroughness, he catalogued the mass of decisions which had grown up around zoning in the American courts, the favorable and the unfavorable. As he put it, "the overwhelming weight of authority, as expressed in judicial decisions, is in favor of the constitutionality of zoning."³³

The special contribution and the most interesting feature of the Bettman brief was its planning argument. This rested upon a view of municipal legislative competence which Baker had assaulted. "In answer to the line of attack which seeks to deride the capacity of municipal councils to legislate wisely, it is sufficient to say that our constitutional system is not and can not be based upon the assumption of the stupidity or mediocrity of our legislative assemblies."³⁴ Zoning "represents the application of foresight and intelligence to the development of the community."³⁵ An important and rather courageous facet of the argument was its dissociation from Metz-enbaum's stand that the law underlying zoning was really nothing new. Bettman at first seemed to agree with that. Yet his summary was to the effect that while zoning had a similar purpose to those of other property controls, it was not merely nuisance suppression but "Constructive Planning"³⁶ to promote the welfare of the public.

Rejecting Baker's charge that it was merely an attempt to regulate aes-

thetics, he argued that orderliness was being confused with beauty. "When we put the furnace in the cellar rather than in the living room, we are not actuated so much by dictates of good taste or aesthetic standards, as by the conviction that the living room will be a healthier place in which to live . . ." ³⁷ The same argument was to appear in the text of the opinion as a rationale for the *Euclid* decision. The opinion's figure of speech was a "pig in the parlor." ³⁸

Euclid's counsel labored long at his responsibilities. Between the first and second arguments, he published an article in *The American City* in which he suggested the national implications of an adverse decision and, in passing, remarked that the village had overwhelmed Ambler with its proof.³⁹ At last, reargument came. "As I was permitted to raise my voice in behalf of the cause of the people, there was but a single thought in mind, and every ounce of energy was thrown into the balance on that four hundred and thirty-fourth anniversary of the discovery of America—October 12th, 1926." ⁴⁰

In the beginning of November he wrote to the Clerk of the Court advising him that in each of his briefs he repeatedly referred to the reports of the New York commissioners "which really furnished the very basis and foundation for comprehensive zoning throughout the country . . . For months I had been trying to obtain enough copies so that each member of your Court might be supplied with either a cloth or a paper covered edition of either the 1913 or the 1916 Report." ⁴¹ Stating that he knew that one of these volumes had been sent to Chief Justice Taft, and Justices Stone and Brandeis and possibly McReynolds, he now requested that the four additional copies which he had ordered from New York be distributed to the other members of the Court.

There was one request which got special emphasis.

I am particularly anxious that Justice Sutherland should have a copy of either the 1913 or the 1916 Report, because he did not hear the original argument of the case last January and in that argument I unfolded much that was contained in these Reports, whereas in the more recent argument I merely touched upon that subject and addressed myself more prominently in reference to the so-called "facts" in the Record.

I am quite certain that Justice Sutherland does not have any kind of copy of the 1913 or 1916 Report and so I am extremely desirous that he may have one of the four copies which is now being sent from New York to your office.⁴²

The copies came in. The clerk's office answered. It "took particular care to see that a copy was furnished to Mr. Justice Sutherland and Mr. Justice Butler."⁴³ Three weeks later the Court issued its opinion in *Euclid*. By a vote of six to three, it reversed the judgment of the lower court. The author of the majority opinion was Mr. Justice Sutherland.

Granting that the special nature of the institution makes all its decisions extraordinary, the Court's *Euclid* opinion was on the whole conventional. To describe the intricacies of a zoning ordinance does not afford much of an opportunity to display literary or analytical brilliance. Having disposed of this necessary preliminary, the opinion began by accepting Judge Westenhaver's version of the future of Ambler's investment: "the normal, and reasonably to be expected, use and development of the [land bordering Euclid Avenue] . . . is for general trade . . . and the residue of the land is for industrial and trade purposes."⁴⁴

While it agreed that the broad issue was the constitutional limits of the police power, that was not the crux of the case. Drawing in broad strokes, it first turned back to the early twentieth century to discover the origins of zone laws. It found that they were an answer to the problems created by rising population and urban congestion. City life grew more complex and demanded restrictions on private land which would have been legally unacceptable during the nineteenth century. Such changes of circumstances, not some hard-and-fast line, would determine whether the police power could be used to impose new restrictions.

To discover just how far the police power would stretch in *Euclid*, it found some help in the traditional law of nuisances. As Bettman had suggested, that body of law should not have controlled the decision, but it could furnish helpful analogies. Like the question of what constitutes a nuisance, the problem of the limits of the police power could not be answered in the abstract. "A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard."⁴⁵

There was no longer any uncertainty in the American courts about building height controls or use controls over hazardous or nuisance-producing activities. But here the zoning classification of Ambler's land could prohibit uses which might be neither a hazard nor a nuisance. That was the problem. "The serious question in the case arises over the provisions of the ordinance excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning

legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this Court has not thus far spoken.”⁴⁶

It was impressed by the zoning work of “commissions and experts, and the results of their investigations have been set forth in comprehensive reports . . . which bear every evidence of painstaking consideration . . .”⁴⁷ In such work the Court found the reasons for the constitutionality of Euclid’s ordinance. The New York commissioners had identified the reasons ten years before: fire control, better home life, reduction of traffic in residential areas, diminution “of noise and other conditions which produce or intensify nervous disorders; [preservation of] a more favorable environment in which to rear children, etc.”⁴⁸ In addition, the Euclid ordinance promised protection against the apartment house which, in areas of detached homes, is often a “mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.”⁴⁹

The tone of the opinion lacks certainty that the village’s restrictions were either wise or sound. But the Court was unwilling to find them clearly arbitrary or unrelated to the usual objects of the police power. However weak its conviction, it had accepted the essential promising details out of which the planning argument had been made early in the century. Ambler lost its case and perhaps several hundred thousand dollars. But planning’s advocates had won the opportunity to treat the decision as their victory.

Metzenbaum reported that with the victory came “rejoicing from coast to coast . . . evidence of the relief of the citizenry who had been looking forward to the right to aid in making our cities worth while.”⁵⁰ There is no doubt that the case had been closely watched by diverse groups. They formed the advance guard of those which were to follow the course of American zoning over the coming decades. A substantial file of Supreme Court correspondence reflects who had been touched when the news about Euclid’s appeal began rippling out across the nation.

In an effort to strengthen his position Baker had suggested that clients of a Minneapolis attorney faced with comparable problems ought to seek *amicus curiae* standing. They did. Lawyers from such scattered places as Des Moines, Baltimore, New York, Los Angeles, Pittsburgh, St. Petersburg, and Tulsa were writing for information before the case was decided. A justice of the high court of Maryland, who had been assigned to write an

opinion in a zoning case, was anxious for the *Euclid* opinion when it was issued.

The day after it came down, Hoover's department ordered a number of copies. A new round of correspondence and telegrams from around the country came in, this time for copies of the opinion. One sender of a telegram, the Clerk of the Supreme Court of California, just wanted to be certain that the decision was final. As if to suggest one of the possibilities lurking in the result and to memorialize the fact that Indiana was the state in which the activities of the Ku Klux Klan reached national heights during the twenties, a lawyer from Indianapolis wrote for copies for his client. He represented the "White People's Protective League."⁵¹

The traditional view of the *Euclid* decision recognizes two heroes. One is an idea, planning, and the other a man, Bettman. If legal history must have them, as it often seems to in such cases, it is impossible to accept either of these without including the contribution of the New York commissioners. Bettman's brief is shot through with references to their work. Metzenbaum's efforts to get this material before the Court and his repeated professions of *Euclid*'s reliance upon it are other indications. And, of course, the national achievement upon which both Bettman and Metzenbaum drew was as much a tribute to Bassett as it was to the New York reports.

The difficulty with cataloguing the men and the ideas which decisively affect a judicial result is compounded of a commentator's presumption and the mists which hover in the mind of even the most lucid of judges. The presumption is no more complicated than the act of A's telling B why B decided to do what he did. In the face of a judicial opinion, it is heightened when B has gone to great efforts to announce his reasons with painstaking care. Thus, when the commentator classifies what he believes to be the "true" factors which led to a result, he often finds himself not only telling the judge what the judge thought, but, even more noisomely, telling him what he thought he thought.

Cast into this potentially offensive enterprise are the influential vagaries of the human mind, judicial or otherwise. In a judge neither intellectual distinction nor sublime judicial temperament ever quite dispels them. One of the most systematic, perceptive, and civilized accounts of this quality in the judicial mind appeared during the *Euclid* era. Benjamin N. Cardozo rendered it in a series of lectures delivered at the Yale Law School at the beginning of the twenties. Then a noted member of the New York Court of Appeals, Justice Cardozo took his audience on what turned out to be a

poetic exploration into "The Nature of the Judicial Process." The lectures could just as well have been entitled with the question they answered: "What is it that I do when I decide a case?"⁵²

Nodding to a term if not the content of Freudianism then coming into vogue in America, Cardozo saw judging as an act of both the conscious and the subconscious. When a judge has labored through the traditional stages in the search for law, his subconscious may come into crucial play. At that point law's golden ideal of absolute judicial detachment ends.

When *Euclid* got to the Supreme Court it had come as close to the ideal as American litigation ever gets—the appellate argument. There the serious strain of rapid decisions often demanded of the trial judge and the emotional overtones in jury trials have fallen away. The record has been made and cooled. If they exist at all, personal relationships are usually more remote. Time does not press so insistently. But as close as appellate argument may come to a contest between ideas from which man's prejudices and pressures have fallen away, it is not a session at the academy. If the Greeks were able to sustain the duel between disembodied ideas, it is an accomplishment denied even the loftiest appellate court. Every judge brings to his decisions all that life has made him out to be. Remarkable idealist though he was, Cardozo had no illusions about this reality, which he called the subconscious. He said:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of the "total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter.⁵³

Nine justices participated in the *Euclid* decision (Fig. 75). Each had his stream of tendency. If the decision stood for the triumph of the planning idea—a new role for government and a new role for private property in rationally shaping the growth of the American city into a more humane place—there is a fundamental difficulty with that conclusion. It can be put

in two ways. The sum of most of the nine judicial philosophies should have added up to a majority vote against zoning's constitutionality, or, alternatively, no American legal institution of the twentieth century has managed to recruit a more improbable ensemble of judges to support it.

Whatever else it was, *Euclid* was a significant expansion of the shadowy limits of the police power. Yet, it is very clear that in the years leading to *Euclid*, the Supreme Court had been engaged in such a remarkable contraction of the power that it produced a major era in American constitutional history.

Earlier in the century, scholars had questioned a prevailing view that the Court was reactionary when it dealt with the social legislation of the reform period.⁵⁴ But between 1920 and the 1926 decision in *Euclid*, an extraordinary change was under way. After a searching examination of the Court's decisions in the field, an article in the *Harvard Law Review* in 1927 reported: "it is somewhat of a shock to discover that in the six years since 1920 the Supreme Court has declared social and economic legislation unconstitutional under the due process clauses of either the Fifth or the Fourteenth Amendment in more cases than in the entire fifty-two previous years during which the Fourteenth Amendment had been in effect." ⁵⁵

The *Pennsylvania Coal* case in 1922 was one of the reasons for the consternation. In the previous year Chief Justice Taft wrote for a majority of five which struck down an Arizona statute restricting injunctions against peaceful picketing. In dissent, Holmes deplored the result: "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect." ⁵⁶

The debris of this wrecked social legislation was strewn across the first half of the 1920's.⁵⁷ In 1923 a unanimous court threw out a Kansas compulsory arbitration statute.⁵⁸ A year later, with Holmes and Brandeis in dissent, it struck down a Nebraska statute aimed at protecting buyers from short weights and honest bakers from unfair competition.⁵⁹ But easily the top candidate for the most shocking of the decisions came down in 1923 when a five-to-three court (Brandeis not participating) struck down a congressional statute setting procedures for minimum wages for women and children in the District of Columbia. Reaction to *Adkins v. Children's*

*Hospital*⁶⁰ was violent. The labor movement and the Department of Labor deplored it with epithets of “brutality” and “calamity.”⁶¹

Most of the nine men who decided *Euclid* had a hand in a good deal of the judicial demolition.

Holmes and Brandeis voted in favor of zoning’s constitutionality. With the usual exception of the former, and the almost invariable exception of the latter, the dominant streams of tendency in virtually all the justices were clearly conservative. Certainly this was so in cases involving governmental regulation of private property, typically the kind of litigation generated by attempts to use the police power in novel ways such as zoning.

In point of service on the Court, Holmes and Brandeis were among

75. The *Euclid* Court, 1926. Standing (left to right): Justices Sanford, Sutherland, Butler, Stone. Seated (left to right): Justices McReynolds, Holmes, Chief Justice Taft, Justices Van Devanter, Brandeis. LIBRARY OF CONGRESS, DIVISION OF PRINTS AND PHOTOGRAPHS.



those with the longest experience. The other two justices who had also come on the Court before the 1920's were Willis VanDevanter (1911) and James Clark McReynolds (1914). President Taft had appointed VanDevanter. By the time of *Euclid*, Taft was the Chief Justice of the United States. Not surprisingly, therefore, Taft and VanDevanter shared many of the same views.⁶² As conservative in outlook as he was benign of countenance, Van Devanter had moved from Indiana to the Territory of Wyoming, where he served as a territorial judge and later in the judiciary of the new state. He resigned to develop a successful law practice and become chairman of Wyoming's Republican State Committee. Taft, who took his Supreme Court appointments as seriously as any of his presidential responsibilities, elevated him from a lower federal court judgeship.

VanDevanter voted against the constitutionality of zoning.

By the 1920's, Justice McReynolds enjoyed a reputation for staunch conservatism hemstitched with an unusually elaborate, personal nastiness. Although McReynolds was a Democrat at the time, Republican President Theodore Roosevelt had appointed him Assistant Attorney General. At the time Wilson nominated him for Attorney General, he was associated with a Wall Street law firm. A year later, Wilson proposed him for the Court. He became its "problem child"⁶³ and perennial work-shirker. Shortly before the *Euclid* decision, without any notice to his chief, he answered an "imperious voice" (which he would hear again) calling him to a duck blind in Maryland. McReynolds' special object of hatred was his judicial brother, Brandeis, next to whom he refused to sit for a Court portrait. In 1922 he declined Taft's proposal that the Court attend a ceremony in Philadelphia, telling the chief, "As you know, I am not always to be found when there is a Hebrew abroad. Therefore my 'inability' to attend must not surprise you." Taft found that Court business went well when McReynolds was absent.⁶⁴

Justice McReynolds voted against the constitutionality of zoning.

Presidents Harding and Coolidge had appointed all the remaining five justices between 1921 and 1925. Chronologically and symbolically, the first of these elevations was Taft. When Harding called him from a chair at the Yale Law School, Taft realized the highest ambition of his extraordinary public life. After his unhappy presidential term, he went off to New Haven where, forty years earlier as a Yale undergraduate, he had fallen under the influence of William Graham Sumner.

The Taft scholar, Alpheus Thomas Mason, described Taft as a "thor-

ough-going Social Darwinist, an outspoken critic of governmental regulation.”⁶⁵ He believed the concepts of liberty and property were inseparable. Mason says that “Scrupulous respect for property rights remained the core of his ideology.”⁶⁶ An inseparable part of this fundamental tendency was both a deep mistrust of the popular will and a passionate belief in a powerful judiciary holding the law unbreachable by efforts at social experimentation.

Taft voted in favor of the constitutionality of zoning.

Possibly the most obscure member of the *Euclid* Court was Justice Edward Terry Sanford. He served for many years as a federal judge in Tennessee and in 1923 Harding elevated him to the Court. Like Taft, McReynolds, and VanDevanter, he too was identified with a narrow view of governmental power where social innovation was involved.

Sanford voted in favor of the constitutionality of zoning.

Harding also appointed Pierce Butler in 1923. A successful corporate lawyer and general counsel for a major railroad, he was Chief Justice Taft's second choice when Taft was lobbying for the vacancy Butler eventually filled. Taft wanted Harding to name Wall Street lawyer John W. Davis who, although he ran against Harding in the 1920 presidential election, wore the same conservative stripe as Taft. When Davis declined to leave his lucrative practice, Taft began promoting Butler, spurring him to get important letters of recommendation onto the President's desk. Taft backed him enthusiastically because he was convinced that Butler was constitutionally sound.

By Taft's lights, examples of men who were constitutionally unsound (“progressives” or “enemies of the Constitution”) were three who had been mentioned as possible nominees for the seat Butler would occupy. One of those was Benjamin N. Cardozo. Of him Taft wrote: “Cardozo is a Jew and a Democrat. I don't think he would always side with Brandeis, but he is what they call a progressive judge.” The second was Cuthbert W. Pound. Like Cardozo, he was then serving on the New York Court of Appeals, one of the great American benches of the twentieth century. Pound was a solid Republican but Taft spurned him, noting that he had dissented with Cardozo and was not the sort of regular who would help Taft “mass the Court.” The third reject was a man whom President Taft had appointed to the lower federal bench. But now Chief Justice Taft feared that if this seasoned judge were promoted to the Court “he would almost certainly herd with Brandeis and be a dissenter.”⁶⁷ Thus Learned

Hand—one of the towering figures in the history of the American judiciary—was left below.

Regular, solid, constitutionally sound Butler voted against the constitutionality of zoning.

VanDevanter, McReynolds, and Butler were thus ranged against the Euclid ordinance. Every bit as constitutionally dependable, Taft and Sanford voted the other way with Holmes and Brandeis. If these four men with their oppositely flowing streams of tendency could be drawn together to find zoning constitutional, it is probably just as strange that the remaining two justices, Harlan Fiske Stone and the author of the majority opinion, George Sutherland, joined them to give zoning its six-to-three constitutional victory.

Like other judges before and since, Stone suggests the hazards of forecasting a man's vote once he puts on judicial robes. The progressive Woodrow Wilson had known disenchantment in McReynold's case. When Coolidge (who knew him at Amherst) put Stone on the Court, he was an attorney with many credentials so heavily suggestive of conservatism that he was opposed by several senators on the grounds that he was "Morgan's lawyer." ⁶⁸

As it turned out, his judicial career was marked by the steady conviction that in a democracy law has to make accommodating changes with which courts should not interfere. A decade after he voted to uphold the Euclid ordinance, he wrote: "There comes a time in the organization of a complex society when individualism must yield to traffic rules and when the right to do as one wills with one's own must bow to zoning ordinances or even to price-fixing. Just where the line is to be drawn between individual liberty and government action for the larger good is the perpetual question of constitutional law." ⁶⁹

Of the nine men on the bench, the tendencies of Holmes and Stone were perhaps the most difficult to peg because they were each possessed of that most complicated of human qualities, a high intelligence in the service of an open mind. And of those nine, Justice Sutherland's tendencies were the easiest to classify because the mind which his excellent intelligence served was closed. He was an impressive *a priori* intellect.

The irreducible fact about *Euclid* is that zoning survived its constitutional challenge in the highest court of the nation. That made the case a landmark. A second fact, although even more intriguing than the first, has fallen into oblivion. Considering the towering role *Euclid* enjoys in

the chronicles of American urban reform, it is extraordinary that Mr. Justice Sutherland was the author of the opinion which secured *Euclid's* hold on history.

Unless he speaks solely for himself in dissent or separate concurrence, he who writes for a court of more than one judge is not only an orchestrator but a composer as well. It is true that the opinion is a composite work issued only after those for whom the author speaks have had the fullest opportunity to create a finally acceptable draft. Yet, group effort though it must be, in the end the opinion shows the hand of its writer and not those of his silently concurring brethren. He gives the work its identity. Something more than an economy of names is involved. It is he who initiates the first draft. He must carry the burden of smoothing the differences among his colleagues who, although they agree with his result, may be more disagreeable in their support than those in dissent. In the end he must defend his authorship, however free he may be of literary or judicial pride. In the Supreme Court the task of arriving at an acceptable opinion calls for those special arts of persuasion demanded in a situation where all dealings are among powerful equals. In this respect it is substantially like any other multiple judge court. Where it differs is in the pervasive sense that the final result of authorship in this frustrating, exhausting, and stimulating process is very likely to be not a document of ink and paper but a quite durable stone carving.

The *Euclid* opinion was the product of a man who was swept on a stream of tendencies which formed in the last half of the nineteenth century. Although Sutherland sat on the Supreme Court from 1922 to 1938 and was heavily involved in public affairs for years before that, for him that stream ran undiverted by the enormous changes in twentieth-century American life.

It may well be that a laurel wreath for the *Euclid* decision should have gone not to Metzenbaum or Bettman, or to the small zealous group of men who made zoning one of the important progressive missions of this century. With a kind of ultimate irony, the credit for the constitutional triumph of zoning may belong to the nineteenth century's Herbert Spencer, whose influence had been indelibly impressed upon many of the very conditions which zoning was supposed to control or destroy. As Sutherland's role on the Supreme Court demonstrated, Spencer's mind went marching stoutly on long after his body was laid to rest.

The opening chapter of this book sketches the pervasive influence

which Spencer's thinking had upon men who were maturing at the turn of the century. Sutherland was one of them. His biographer, Joel Francis Paschal, writes:

Sutherland, throughout his public career, walked in the shadow of Herbert Spencer. He appropriated to his own use the philosopher's ideas of liberty, evolution, and progress. Moreover, he also appropriated the Spencerian method. For all the data with which Spencer buttressed his arguments, he was not concerned primarily with facts, nor did they furnish him his point of departure. Instead, he began with a theory to which the facts must necessarily conform. When they did not conform, it was because the essential ones had not been discovered. This deductive method characterized all of Sutherland's efforts. Always there was a recurrence to first principles. That these principles were those of Herbert Spencer accounts for a major chapter in the history of the interpretation of the American Constitution.⁷⁰

Sutherland was one of the few foreign-born members of the Supreme Court. In 1863 his father brought him as an infant from England. The family went to Utah. At the age of twelve Sutherland had to leave school to take employment as a clerk in a Salt Lake City clothing store. After a stint at such jobs, he scraped together enough money to return to Brigham Young Academy in Provo, the predecessor of what is now Brigham Young University. Karl G. Maeser, a German whose conversion by Mormon missionaries is said to be one of the great epics of their church, ran the academy. While he was sitting on the Supreme Court Sutherland wrote that the schoolmaster "was one of the best men I have ever known, and his teaching, example and character have exercised the most profound influence upon my life."⁷¹

Although Sutherland was not a Mormon, Maeser's religious conviction about the divine origin of the American Constitution took deep root in the young student's imagination. Even in the midst of the great court crisis of the New Deal, Sutherland continued to believe this.

Maeser was a model true believer of America's nineteenth century. For him the individual accounted for the progress the human race had made in great spheres of life such as art and politics. He ranked Spencer with Plato, Aristotle, Bacon, Newton, Leibniz, and Kant. Sutherland got his view of the state from Spencer. It was, he believed, an unnatural outcome of massive population growth and a denial of the wholesome loneliness and freedom which nature had intended for man. Breaking the pattern of nature's design, government was always suspect. It had to be restrained

from attempting anything but the preservation of order and the settlement of disputes. When it tried to deal with problems like relief of the poor, for example, it was tampering with the overriding system which had produced the wealthy classes and was thus cheating nature.

If Sutherland got his cosmology from Spencer, he got his American constitutional law from the author of "the most influential treatise ever published" ⁷² on the subject. In 1882 Sutherland went east to the law school of the University of Michigan. There, for over a generation, Thomas McIntyre Cooley had been teaching and writing with an influence unique in American legal education. During his tenure on the faculty, he sat on the Supreme Court of Michigan, a post he held while Sutherland attended the school. By the time the young Sutherland came to study at Michigan, Cooley had become a noted constitutional authority, the author of a treatise, *Constitutional Limitations*, by then in its fifth edition. It was still heavily used when *Euclid* was decided. Cooley's work got its impressive reception both from the fact that it was the first systematic effort in the field and from its emphasis on the limitations rather than the possibilities of public power. The stress harmonized perfectly with the dominant political and economic ideas of the post-Civil War period. For a nation whose business and industrial leadership was sworn to the oath of *laissez faire*, Cooley's work was a splendid instrument of authority for the conservative lawyers and judges of the era.

Sutherland returned to Utah and eventually became a member of a leading Salt Lake City law firm. He went into politics, got elected to the state legislature, and after a term in Congress won a seat in the Senate. After his defeat in 1916, he opened a Washington law office and served as the president of what was then the ultraconservative American Bar Association. In the 1920 campaign he was one of Harding's closest advisors.

The year before his appointment to the Court, he spoke to the New York State Bar Association on the evils of redistributing wealth without the consent of the wealthy. "Any attempt to fix a limit to personal acquisition is filled with danger," just as there was danger in the growth of "vaguely conferred powers in the hands of administrative bodies." That Spencer was at the root of his thinking is clearly revealed in his proposition that there were "certain fundamental social and economic laws which are beyond the power, and certain underlying government principles, which are beyond the right of official control, and any attempt to interfere with their operation inevitably ends in confusion, if not disaster. These laws

and principles may be compared with the forces of nature whose movements are entirely outside the scope of human power.”⁷³

Considering his vital political service to Harding, it was a foregone conclusion that he would go on the Court. Taft knew it when he took the Chief Justiceship, and he was delighted at the prospect. “. . . I know as you do that your coming on will strengthen the Bench. Our views are much alike and it is important that they prevail.”⁷⁴ When Sutherland’s appointment finally came through, Taft was enthusiastic from the “bottom of my heart.” He continued: “I should judge that the Court is about to enter upon another period of agitation against its powers, such as it had in the period before Marshall came on to the Bench . . . LaFollette’s overwhelming victory in Wisconsin will put great confidence into the hearts and souls of all who are opposed to property rights and the support which the Constitution gives to them . . .”⁷⁵

The year after Harding sent him to the Court, Sutherland wrote the majority opinion in *Adkins v. Children’s Hospital*, the morning star of his career as a Supreme Court Justice. Joel Francis Paschal offers this simple description: “Basically, the decision in the *Adkins* case was an attack on the very idea of government.”⁷⁶

Here, then, was the author of the *Euclid* opinion, as convinced and articulate a conservative as any member of the Court, and more deeply opposed to the intrusions of domestic government in the affairs of private property than any of his brethren. How could he have been spokesman for the majority?

Paschal contends that rather than representing an ideological lapse in Sutherland’s position, the *Euclid* decision was a consistent application of Spencer and Cooley.⁷⁷ Spencer had justified the use of political power by the growth of population. One sees in the opinion a suggestion of this in Sutherland’s observation that “Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.”⁷⁸

In this same passage, too, is a glimpse at the immutability of the American Constitution: “the meaning [as distinct from the application] of constitutional guaranties never varies . . .”⁷⁹

Paschal suggests that Cooley was possibly even more important to

Sutherland's reasoning. The constitutional scholar had distinguished regulations which "invaded" property rights from those which did not lessen them. Rather than work a deprivation of property, zoning regulations were enhancing its value. While Cooley was hardly their authority, the New York draftsmen suggested the same thing when they first set out to justify the whole system of controls. Ambler no doubt had some difficulty squaring all of this high-level abstraction with its claim that, thanks to zoning, it had lost several hundred thousand dollars.

Zoning may have been the most brilliant example of constructive urban legislation, and *Euclid* may have been the highest achievement of progressive decisional law in the early history of the American planning movement. But it is now a part of a larger history that the author of the opinion which insured these successes fulfilled his office on a Court which overturned "more constructive legislation than in any period of equal duration in our history."⁸⁰ As Paschal has tabulated, "Sutherland wrote more opinions that have been specifically overruled than any other Justice in the history of the Supreme Court. Of those opinions repudiated by name since the reconstruction of the Court in the late thirties, Sutherland was the author of more than 20 per cent."⁸¹

Spencer and Cooley do not exhaust the explanations of the *Euclid* result. A former law clerk of Mr. Justice Stone suggested⁸² that Sutherland was originally disposed to vote against zoning's constitutionality. But he is said to have come under the persuasive influence of dissenting brethren (principally Stone), who so undermined his original reaction to the case that he reversed himself and voted favorably. Without knowing what Stone's argument was, this version at least raises some question about the general rigidity of Sutherland's mind.

The power of great teachers and an influential philosopher, and the persuasiveness of colleagues do not quite end the catalogue of credits either. While it was not much of a tribute either to Sutherland's scholarship or to his detachment, the *Chicago Journal of Commerce's* rationalization of the result was couched in the most readily understood terms of all. "The Justices do their work in Washington. Most of them live within the city limits. As they hold office for life, they regard the place of their work as their permanent home. Many of them own homes within the city and Washington has zoning . . . and Washington is benefited by zoning."⁸³

Zoning was a triumph of statistics and, whatever the reasons, of constitutionality as well. Yet the essential things being said about it during the twenties had very little to do with either its legislative engulfment of the nation's cities or its victory in the Supreme Court. The higher criticism came from several quarters. One was to be found in much the same intellectual coterie which Harold Stearns had organized into the 1922 symposium, *Civilization in the United States*. A year earlier Stearns had published his own book, *America and the Young Intellectual*¹ which read rather like the prologue for the collection of essays which he edited. His book as well as the pointed comments about zoning which developed during the decade shared a common quality, a gnawing and deep dissatisfaction with the character of American urban life.

Stearns's loudest cry was that the country did not want young men interested in ideas. It demanded doers instead, with the result that "many young Americans start out to become intellectuals, disinterested lovers of the truth, and end up by becoming reformers."² If the nation was not hospitable to ideas, it was in the grip of the religion of optimism. The popularized conception of evolution had "given the common concept of progress an odd twist. To-day progress means specifically the lapse of time."³ He argued that the acquisition of things rather than the way they were used was America's great preoccupation. The result of the national disinterest in the quality of life was a home town which youth found "dismal, dismal beyond the endurance of men . . ."⁴ There seemed to be no hope that this environment could be changed.

It has recently been suggested⁵ that the "standard picture of the twen-

ties" ⁶ as a period of disillusionment is historically inaccurate. Disenchanted autobiographical works published during the twenties—Steffens' *Autobiography* ⁷ and Frederic C. Howe's *The Confessions of a Reformer*, ⁸ for example—supposedly expressed an attitude that one could have found among reformers early in the century. According to this view, there was no disillusionment in the twenties because intellectuals never really had any illusions before the War.

Valid as this may be in some respects, the fact is that in the pre-war-making years of zoning there was enough time for even a first, faltering criticism to develop. It never came. It was not until the twenties that it finally appeared. Any criticism of the young institution was therefore novel. But there was also a novelty about the description of the urban environment in which zoning was growing. The years before the war simply lacked anything like the intensity of disgust and the thorough rejection of values which this literature of the twenties expressed.

In a 1926 *Harper's* article Lewis Mumford slashed at the inhumanity of "The Intolerable City." ⁹ "The mouths of our great cities are gigantic hoppers," ¹⁰ he said, spewing forth conditions which, however immeasurable, denied the real promises of urban life. The grace, interest, and amusement in the lives of ordinary men and women were ground down by the exhausting conditions of artificial light and ventilation in places of work, the crush of the subway crowd, the stench of automobile fumes, the shrinkage of living space, the shad-killing sewage pouring into the Hudson River.

He thought that the flight to spreading suburbs like Chestnut Hill and Santa Barbara held only a temporary promise of re-creating an environment which the aimless growth of America's cities had destroyed. This abandoned city, he warned, would catch up and doom the amenities of life the quest for which had brought about the flight in the first place. In the end, he argued, the question was how to provide "a stable environment for a stable population," ¹¹ surely as slippery as any a semanticist might try to get his hands on.

This difficult question, which cut much closer to the conduct of life than the design of streets and buildings, got more manageable when Mumford put it in terms which Ebenezer Howard had laid down some years earlier. The population of an urban area would keep turning on the vicious circle of congestion and rising costs as long as no limits were

placed upon its growth. Only by deliberately planning and building new towns of finite size like England's Letchworth and Welwyn Garden City, and like that intimated at Sunnyside in New York's Queens, could a solution be found. There the great new techniques of transportation might bring an even distribution of population across the land by putting home and work in the same contained area. He equated many planners with real estate speculators by nailing upon their thinking the assumption that the future metropolis would be a circle of urban development with a radius of fifty miles.

From the pages of Mencken's iconoclastic *American Mercury*¹² Mumford cast current zoning practices into the same camp. With the American city planning movement then approaching early middle age, he saw little change in the growth pattern of cities from that which had prevailed at the time of the 1893 Chicago World's Fair. Despite the intervention of zoning controls, the office and factory were still often not getting sufficient light. The typical American city plan rested on one basis, an indefinite extension of monotonous rectangular blocks along the main routes of traffic. This mechanical pattern expressed "the one function that all American cities have traditionally looked upon as the main end of human activity, namely, gambling in real estate."¹³

There was indeed ubiquitous speculation in urban real estate. It was part of a pattern which the country had developed from the time the white man first laid a calculating eye upon its shores. And notwithstanding the great myth of rural America's innocence of such conduct, the pattern was also to be found out on the ranch and farm lands of the nation.¹⁴ If Mumford was correct that a tenet of the American credo was "that no community can have too many streets, and that no street can possibly be too wide,"¹⁵ he was writing descriptively. But as he himself had so frequently and passionately insisted, "cities" were not abstractions but associations of human beings. Human beings think and act. Of what stuff were these "cities" made?

The twenties produced important answers to the question. They resulted from a systematic application of the techniques of social anthropology upon a small American city, and they were readily understandable. Robert and Helen Lynd conducted the investigation in Muncie, Indiana, and in 1929 published their findings in *Middletown*,¹⁶ a pseudonym for Muncie.

The nearly forty thousand inhabitants of this city showed distinct char-

acteristics. The Lynds' discoveries were microcosmic, but they justified national generalizations which rang true even when applied so broadly. Despite Middletown's suspicion of the big city, the attitudes the Lynds discovered there were not very different from many to be found in the metropolis.

In Middletown, as in the United States generally, white- and blue-collar people worked extremely hard. Their overriding motivation was "the money received for their work. It is more this future, instrumental aspect of work, rather than the intrinsic satisfactions involved, that keeps Middletown working so hard as more and more of the activities of living are coming to be strained through the bars of the dollar sign."¹⁷ The intensifying drive for money was a broad cultural pattern rather than some peculiar trait of a small group. If, then, the real estate speculator whom Mumford deplored was a money-grabbing urbanite, he was made in America. There were many other urban Americans with no direct stake in land investments who showed the same pattern of interest, whether or not the nature "or the consequences of their work was half as interesting as the money it produced."

Although getting a living lacked that essential love of work which was once supposed to mark the labors of men in other ages, Middletown reserved deep affection for its homes. Indeed, "Home ownership is a mark of independence, of respectability, of belonging . . ."¹⁸

They put great store in their homes and in money. As far as their 61-million-dollar urban plant was concerned, they looked upon its public custodians in just about the same way as they had almost a century before when the town ran on an annual budget of under a thousand dollars, some four hundred times as small as the annual budget of the twenties. They believed that periodic elections would produce the best man for municipal government. Yet somewhat inconsistently, "in the minds of many citizens, politics is identified with fraud."¹⁹ The best citizens who once ran the town's government no longer served in public office. Once prestigious jobs like that of mayor or judge had been abandoned to lesser types. Now the top ranks of city life were occupied by businessmen, and "business and politics don't mix."²⁰ The energies and the attitudes of the natural leaders in the town were concentrated on earning a living, concentrated in ways the city had not known in years before. Appeals to them to serve the public were met with the reply: "I can't afford to."²¹

The Lynds concluded: "In a civilization in which the health of the community is gauged by its financial pulse, preoccupation with private rather than public business on the part of its ablest citizens is increasingly regarded by Middletown as not only a normal but a desirable state of affairs."²² If this was the nature of urban Americans, the abuses of a planning instrument like zoning should have been laid at the feet of the general population rather than some tiny group of shrewd manipulators.

Another tenet which Mumford found in the American credo was "that zoning is an automatic relief for all the evils of unregulated or badly regulated city development."²³ He knew exactly what it was supposed to be, and it is refreshing to read his exposition, written at a time when most of those who spoke about the institution were already afflicted with a deep-seated amnesia. "Zoning, properly speaking, is the legal agent of intelligent city planning . . . Zoning without city planning is a nostrum; and city planning without not merely an initial control of land—which every municipality has in its unplanned areas—but a continuous supervision over its actual development and uses is merely a branch of oratory or mechanical drawing."²⁴

Indeed, as Mumford saw it, zoning without planning was an obstacle to good planning. One of the elements in his definition of "good" was variety in residential areas. Another was the preservation of open space and large-scale development of such areas. In zoning's hierarchical system of residential uses—free-standing, double and row houses separated and isolated—a lack of planning meant increased monotony. Zoning was needlessly chewing up land by prohibiting common garages in residential districts. For every large-scale planned development like Sunnyside, there were thousands of piecemeal, monotonously zoned, speculative building operations going on. "In sum, the zoning ordinances today have, like the city plans that were spawned between 1900 and 1910, chiefly a decorative value. Used realistically, used in the best interests of the whole community, they would upset the speculative pyramid upon which American city development rests. Their present use is to keep that pyramid in equilibrium; and while this is their task, their practical applications are narrow, uncertain, and ineffectual."²⁵

He ended up where the whole thing had begun, in Europe, especially Germany and England where he found the best modern planning practices. There, large tract operations were planned as a whole. Despite isolated

experiences like that of Radburn, New Jersey, during the twenties, this kind of totally planned, tightly controlled city building was even less tolerable to the national spirit than it had been a decade or two before when the Howes and Bassetts were bringing back their enthusiastic accounts of urban development in Europe.

Mumford's criticism ultimately boiled down to something to which the founders of American zoning had never given a first, let alone a second, thought. He was demanding an America grown differently, a culture which only fundamental changes in the American character could produce.

The Atlantic Ocean has worked strange effects upon students of urban life in the West. Often things seemed to look better to the foreign visitor than they did to the native. Frequently they seemed not to hear each other's voices as they passed between the continents. Earlier in the century, while the fathers of American zoning were crating and shipping the German legal apparatus to the United States, one of Germany's leading planners was warning Americans not to import such institutions.²⁶ In the next decade Mumford was heralding the brilliance of German and English town planning while striking hammer blows at the inadequacy of planning and zoning in the United States. In the midst of this assault, Raymond Unwin, the great English planner for whom Mumford had enormous respect, came to the United States. He had been here some years earlier. In comparison with Europe, Unwin found that America of the early twenties had many more cars and high buildings which intensified land uses. When these features were imposed upon the gridiron street pattern there was a serious rise in congestion. Yet he was deeply impressed by the growth of the planning and zoning movement. It struck him as a serious effort to bring proper control to city building. Once he disposed of the congestion, he weighed the vast flood of immigration which was only then letting up and concluded that "when all the circumstances are considered, the achievement of the modern American city is a very wonderful one."²⁷

Perhaps these seemingly large differences between a Mumford and an Unwin were not differences so much as observations about separate pieces of a large mosaic. The urban discontent of American intellectuals like Mumford was a criticism of the intangibles of American life. The praise of a foreign observer like Unwin was a comment upon the physical expressions of that life.

Bruno Lasker was involved in the same task which engaged Mumford.

Coming at his subject from another angle, Lasker wrote an article in 1920 in *The Survey* entitled "Unwalled Towns."²⁸ It led to a published debate of sorts between Lasker and Charles H. Cheney, then a consultant to the City Planning Commission of Portland, Oregon.

Lasker's piece was about the shifting culture of urban America. He used Portland's proposed zoning ordinance (and those of other western American cities) to document what he believed to be an important change then under way. American communities, he wrote, were becoming excessively specialized, with the result that their populations were being separated by tastes, habits, and opportunities. Increasingly, the middle class was being excluded as an influence on public policy. He said that one could see a kind of wall being raised against it in the shape of physical plans and zoning arrangements. These seemed to make enlarging provisions for principal landowners but to give scant consideration to the middle groups in the urban population. Use controls which set up different kinds of residential arrangements tended to reinforce class segregation. Ordinances such as the one then pending in Portland would in effect legislate a majority of her citizens out of the choicest parts of town. It was clear that Lasker did not intend to criticize the principle of use segregation but rather what he felt to be its expedient application to wall out the middle class.

In the ensuing argument, Cheney made a spirited defense of zoning, the theory of which Lasker had never attacked in the first place. Zoning, wrote Cheney, "brings order out of chaos."²⁹ In a statement as notable for the majesty of its claims as for its announcement of yet another role for zoning, he wrote: "Zoning is the first fundamental step in any city to establish a practical basis for constructive city growth. Until zoning is done, no city planning commission can effectively prove its case as to the necessity for the adoption of a major street plan, or properly promote greater economy, convenience, safety, health and comfort in industrial, business or living conditions; or make the city more beautiful and attractive."³⁰

Decrying the undoubted fact that the West "suffered somewhat [because] . . . much of the discussion on zoning and city planning is in terms of New York conditions only,"³¹ Cheney insisted that the housing situation in virtually all the smaller cities of the nation was better than New York's. What the West saw in zoning was "the greatest instrument yet developed

for bringing back the poor sections of a city to decency in homes—to clean living conditions and healthful environments.”³² If New York’s zoning regulations failed to protect the poor man’s home, that was no reason for indicting western cities.

One thing, however, Portland did have in common with New York and much of the rest of the nation. Zoning not only came before planning but very rapidly seemed to become equated with it.

Alluding to what had been the traditional mode of private land-use control through deed restrictions, Lasker wrote that there was an essential difference between that kind of regulation and the one imposed by zoning. It was the difference between individual acts and public ones. As soon as public control “departs from a classification of use districts and attempts to classify a number of home districts [it] becomes the employing of public power for the purpose of protecting sectional interests. But the city government is supposed to represent the interests of all the people, and no other.”³³

“All the people” had a familiar sound. Like the “whole community,” it was hard to know just what it really meant. If Portland had representative government, and if New York had it, then in theory zoning law in those cities was legislation for all the people. Yet the theory could be terribly remote from the reality. If the Harding administration was teaching anything at all, it was the immense possibilities for making representative government serve the narrowest interests. Like Mumford, Lasker seemed to be saying that zoning laws were passed by and for small powerful groups. But if it had been otherwise, would broadly representative legislation have done away with distinctions between residential districts, leaving the builder free to put up a single-family home or an apartment house as he chose?

Every man has his ideology. The theory-oriented Laskers and the pragmatic Bassetts had theirs. For a Lasker it seemed to be a vision of American city life undifferentiated by the powerful symbolism of the home to which the American was so strongly attached. For a Bassett it was basically the warm acceptance of the underlying design of an existing society which used the home as a clue to class.

Citing articles that Cheney and the Portland city commissioners had published, Lasker scored their attitude toward slum dwellers and foreigners as the real reason for their adoption of zoning. City planners and zoning

experts were appealing to their clientele with promises that the new controls would protect them from “‘undesirable neighbors.’ In fact, all the arguments adduced to show that zoning protects property values are meaningless unless they imply this important element in the determination of values. No height restriction, street width or unbuilt lot area will prevent prices from tottering in a good residential neighborhood unless it helps at the same time to keep out Negroes, Japanese, Armenians, or whatever race most jars on the natives.”³⁴

To clinch the criticism, Lasker pointed to the overzoning for apartment districts in Portland. In a city of then slightly more than three hundred thousand people, Portland was going to set aside a large enough area to house five times as many apartment dwellers “when admittedly there is enough cheap land to house them otherwise.”³⁵

Even more precise documentation of Lasker’s charge appeared soon thereafter in Atlanta, Georgia. The nationally prominent zoning consultant Robert Whitten prepared a zoning system for that city. His scheme, which met with little opposition in Atlanta, was said to have been the first to enact segregation along straight social lines by dividing the residential districts into three types: white, colored, undetermined. Without proposing that an anthropologist be appointed zoning administrator, the ordinance made it illegal for whites and colored to move into sites in each other’s districts. To prevent excessive rigidity, however, the law also provided that a white employer might maintain colored servants in residential quarters on his building lot. And to give the whole thing a touch of even-handed fantasy, it guaranteed the colored resident in his district the same rights with respect to his white servants.

Whitten defended the arrangement on two grounds. Prior to zoning, he said, racial segregation had existed, but it was achieved in a way which both aggravated race hatred and brought economic loss because of the uncertain future of much undeveloped land. Now there would be room for all, and on a predictable basis. The threat of race riots had been removed.

That was the policy argument. The empirical one was that “race zoning . . . is simply a common sense method of dealing with facts as they are.”³⁶ Whitten disagreed with an editorial suggestion that the Atlanta scheme would open up the possibility of making zoning laws operate against groups such as immigrants. Zoning’s first function, he said, in a maxim easier to state than relate to reality, was to protect those who could not protect themselves.

He conceded that zoning did tend toward economic segregation, but suggested that such a result was neither undemocratic nor antisocial. If anything, the consequences of economic homogeneity were desirable. He thought it led to independence of thought and deed, and to an intelligent interest in city, state, and nation. Just how this crop of virtues could be harvested out of, say, a residential district in a white slum sector of the city was quite as obscure as how the unprotected Negro would derive any benefit from the law.

Just as in the case of the corruption which developed during the twenties in the administration of zoning, it did not take the new comprehensive zoning laws to establish the first link between law and the sort of thing Whitten was defending. That was only the most recent in a long line of demonstrations. Shortly after New York passed the 1916 Resolution the Supreme Court handed down a decision in *Buchanan v. Warley*³⁷ which dredged up the ancient American agony in cold print. On the basis of a 1914 Louisville, Kentucky, ordinance Buchanan, who was white, claimed that he was entitled to compel the performance of his contract to sell a piece of land to a willing Negro buyer who proposed to build a house on it. Louisville contended that the contract violated its ordinance prohibiting Negroes from occupying homes on blocks in which the majority of the residents were white. The Supreme Court held that Buchanan was entitled to have the contract performed. The ground of the holding was that the Louisville ordinance infringed the white person's right to choose his purchasers. It was hardly a blow struck for civil liberties, but even that ruling did not discourage a number of southern cities from enacting racial zoning well into the mid-century.³⁸

Even if *Buchanan v. Warley* scotched what otherwise might have been geographically broader attempts to zone out racial minorities, there remained the potential in all zoning ordinances of practically achieving the same result without any mention of racial or other minority groups. The penumbra of constitutional guarantees in the Fourteenth Amendment appeared to end short of a point at which substantial abuses could be imposed by less direct means. The pivot of *Buchanan* was the Louisville ordinance's announced policy of racial segregation. But even without stating such a policy in an ordinance, a city could, by the appropriate enactment of minimum lot and building dimensions, separate economic groups and achieve substantial segregation that way.

Students like Mumford and Lasker wanted zoning to be an instrument

for carrying out urban planning for the benefit of the whole community rather than the narrow demands of special interests. Frederick L. Ackerman, a socially conscious architect and, like Mumford, a charter member of the Regional Planning Association of America, thought that this goal would never be realized until the gains in the value of individually owned property from planning and zoning were distributed publicly. Until then the situation was hopeless. "The town planners, the housing experts, the engineers, the legal advisors, the organizers of moves in the interest of the common welfare are as a small force marching toward an objective upon a moving platform running in the opposite direction at a slightly more rapid rate than their own rate of advance."³⁹

None of these critics, however, found any basic difficulty with the essential feature of zoning—different regulations for different districts in a city. But was there something about that indwelling principle which made the ideal of zoning and planning for the good of the whole community impossible?

Late in the twenties Ernst Freund made one of his occasional appearances at a National Conference on City Planning. Once again he had something substantial to say. Freund came at the question in an exquisitely conceptual essay,⁴⁰ completely out of keeping with the usual sorts of papers presented at these meetings.

He began by putting aside the question of whether zoning ought to be regarded as an act of eminent domain rather than an exercise of the police power. His point was that words ought not to be the basis upon which to decide whether a landowner receives compensation for controls imposed by government. Most zoning cases which upheld zoning did so by referring to the "general welfare." He thought that this rationale had an obscuring effect. The difficulty arose because the control of urban development raised a special legal problem which was a stranger to the traditional police power requirements of health and safety. The seat of the problem was "amenity," a goal associated with zoning but alien to the classic objects of the police power. He suggested that the wiser way to justify this new principle was to justify it rather than pretend it was not new at all.

Original legal thought is something like a perennial host. It always has an abstraction waiting at the door to greet the facts. The facts were, Freund said, that the modern municipality was now performing a function which was something more than and something different from its settled task of simply maintaining peace and order. It was now engaged in providing

public improvements. This was, of course, an oversimplification, but it had the virtue of summarizing the important experience of America's urbanizing twentieth century. Cities were indeed being drawn into a range of problems and works which simply did not exist prior to the era which bred the planning movement in the United States.

Drawing upon history to salt his speculation, Freund carried the police power out of the sovereign hands of American government and back into eighteenth-century continental Europe. There the sovereign, a powerful monarch or petty prince, exercised the police power. He had the power to lay down the style and the detail of city building, especially in capital cities. In the late twenties the results were still apparent in German cities like Mannheim, Darmstadt, Karlsruhe, Potsdam, and Dresden, and in French cities like Nancy and areas of Paris. All of this was evidence of benevolent despotism.

The facts having departed, the host of abstraction remained. The key to zoning matters in the United States was "the subordination of questions of power to questions of equity."⁴¹ The difference, then, between the monarchical exercise of the police power and those exercises in the American legal system was that America demanded something to which the monarch was not subject, fairness. If this was the key, what had to be unlocked? "Every one knows that the crux of the zoning problem lies in the residential district . . ."⁴² The traditional property relationships which zoning had altered were sufficiently important to call for a new principle, one that Freund said ought to involve either the notion of amenity or that of conformity. Amenity was something more than the elimination of nuisances and something less than beauty by legal fiat. In the residential district, "when we speak of amenity we have in mind residential preference."⁴³ That "is controlled by physical and by social conditions, the latter being the more powerful."⁴⁴

Amenity would always require relative terms. So would the notion of conformity. It would be clearer, he said, to talk about nonconformity, the duty to abstain from acts which would cause unfair consequences. He saw an analogy in trade regulation law, which imposed a duty to abstain from unfair competition. The failure to render these ideas into terms of fairness was, for Freund, an essential weakness in the legal theory of zoning.

The other theoretical weakness was that the situations with which zoning had to deal could not be reduced to types. Therefore the equities of a situation could not be put into formulas which would bring about equal

justice. It probably would not have offended Freund's listeners if he had interrupted his theorizing with an occasional homely example of just what he had in mind. It was likely the apartment house in the single-family district, by then a vexed issue in much zoning litigation. In the late twenties it was, if not judicially impossible, at least intellectually embarrassing to pin the label of nuisance upon the American apartment house. Once fictionalized by the courts as a species of domestic glue factory, it did not lend itself to any category of traditional legal analysis. How, then, could these untypable situations and the need for fairness be handled?

Freund proposed that there was a way around the problem, and city planning offered its principled route. The comprehensive plan was the key. Getting to the headiest of his abstractions, he said that in the plan's qualified "assurance of appropriate coordination,"⁴⁵ it tended to demonstrate that "the standard of human performance is apt, although not sure, to rise in proportion to the magnitude of an undertaking."⁴⁶ It is not easy to imagine the ordinary judicial mind reaching for this as a formula for solving a given case, and even more difficult to see it at work in the typical zoning lawyer's attempt to forecast a result to a client who might have wanted to put up an apartment house in a single-family district. Yet for all its airiness, it was about as serious an effort as would ever again be made to put some kind of theory of justice into what the coming outpouring of legal literature and decisional law would call the planning theory of zoning.

In his distinctly abstracted way Freund had a splendid sense of the real nature of life in the residential areas of the nation's cities. Indeed he saw more deeply into some of its aspects than even the Lynds had in Middletown. They had correctly concluded that the American's attachment to his home was great. What Freund added was that the attachment to the locale of the home was not very durable. The whole problem of zoning in the United States was affected by this peculiar pattern.

America had what Freund earlier called an "extraordinary sensitiveness of property to its surroundings."⁴⁷ Just what he meant was made clear in his account of life in European cities he knew.

People do not mind a little store around the corner a bit. When you go to Vienna, you find that the palace of one of the great aristocratic families has a big glass works display room on the lower floor . . . We wouldn't have that in this country because it is not conformable to our ideas. One of the millionaires in Frankfurt built his house right across the way from

an amusement establishment where there were concerts given twice a day. We wouldn't do that . . . There is a subtle psychology about this sensitiveness; I think it is connected with our democratic institutions; where you haven't got natural class differences you make them artificially, but I think the fact is undeniable. If you live in a big apartment, one of our palatial apartments, you don't care who your neighbors are. The sensitiveness is only restricted to the private house where the neighbors are close by. If you go into bigger buildings, just as in Europe, that disappears.⁴⁸

The second remarkable fact was "the instability of American neighborhoods, the lack of attachment to a local habitat."⁴⁹ During the 1870's Freund's father had bought a new house in a new district of Dresden. Whenever Freund returned to the homestead both it and the neighborhood were unchanged. He found practically the same thing true of Frankfurt. There was much mixing of land uses, yet this did not discourage the building of handsome houses next to apartment houses. Europeans did not think as Americans did. In contrast to this great stability, Freund had watched the pace of change in his Chicago neighborhood. He lived on a zoned block near the university. Since he had moved there he had seen the incursion of fraternities and dormitories. "My wife and I feel that we are the last private family to live in our house, and I think other private residents in our block feel the same way."⁵⁰

The conclusion Freund drew from his observations pointed not to any structural defect in the zoning instrument but to the inappropriateness of the device for this nation. "[The] illusion that zoning can fix the character of neighborhoods in permanence should not be entertained. If zoning can produce the standard of stability that is characteristic of cities in older countries, it will render a valuable service, but more than that can hardly be expected, and even such stability will mean a change in the national temperament which at present combines the lowest degree of local attachment with the highest degree of sensitiveness as to neighborhood associations."⁵¹

Freund and the sharp social critics, then, did have a common analytic bond. Their prescriptions had nothing to do with the quillets and quiddities of a legal system. If the promises that were made in New York fifteen years earlier and those which flooded the country during the twenties were ever to be realized, there would have to be basic changes in the attitudes and the style of American life.

Zoning's elder statesmen were present when Freund spoke in 1929. The tone of the ensuing discussion, to which Edward Bassett, Alfred Bettman, and Lawrence Veiller contributed, was about as close to the tone of Freund's lecture as Manhattan was to Mannheim.

Veiller thought that Freund had made "the most important contribution to the science of zoning since the movement was started."⁵²

Bassett began his remarks by confessing something Lawson Purdy had told him during the first stages of the New York studies. "If we pay too much attention to Constitutional requirements as heretofore set forth by the courts, we will never get anywhere. Let us try to frame a method that will be workable, and then make it agree so far as we can with our court pronouncements."⁵³

Purdy's let's-get-on-with-the-job approach fit in nicely with Bassett's. Bassett confided that they had simply assumed that the police power would support the controls. "We did not know what general welfare meant, or at least how it could help us in defining the zoning principles. We knew that dark rooms, dark streets, dust, noise, flies, vermin, vibration, all those things have some effect on safety, or health, or morals, and our code was built up with great trepidation on these bases."⁵⁴

Probably the most difficult rationalization they had to create was one for excluding business from residential areas. "It was a little hard to see why retail business coming into a residence district really affected health and safety . . ." ⁵⁵ But after a doctor in a Washington case testified that flies carry germs to foodstuffs, their doubts were settled.

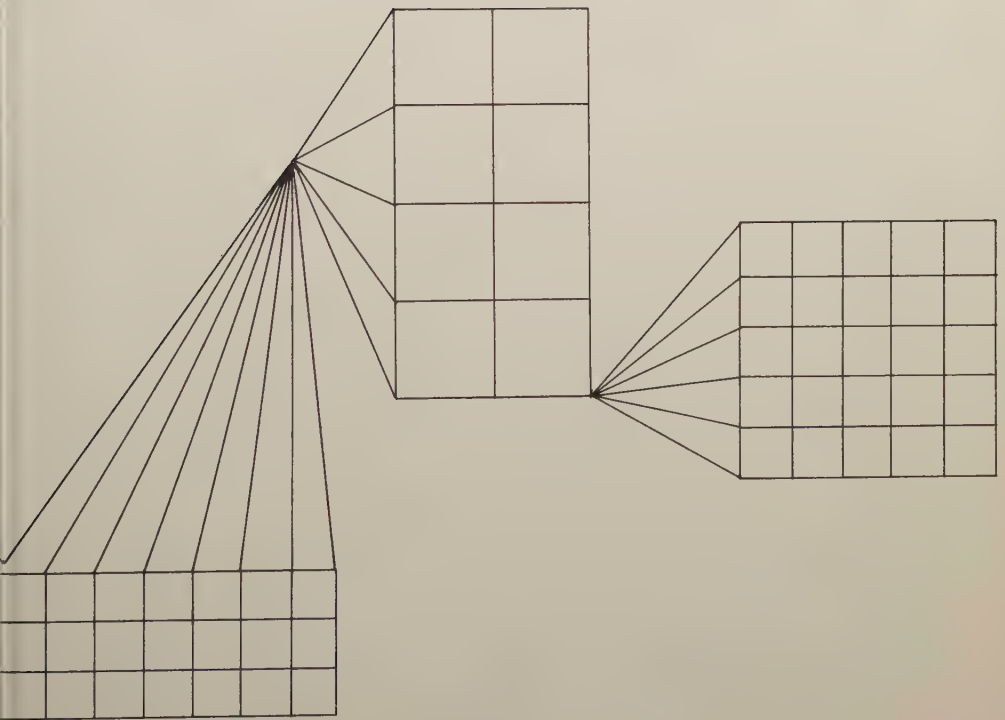
Alfred Bettman was skeptical about "whether a grocery store next door to my house is going to affect seriously the health of my children. There have been mighty healthy kids raised over grocery stores."⁵⁶

These statements were not very far in time from the era in which zoning was made, but their confessional quality, their doubt, their timidity were very remote from the easy style with which the nation's cities and its courts had once been assured of what a good and certain thing zoning was.

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By the end of the twenties the enchantment had ended. In the next decade zoning experienced a severe shrinkage in the number of its enthusiastic supporters and a virtual disappearance of the generous things which had been said about it in the earliest years. As the glow waned the entire institution got swept into the calamity of the Great Depression. But, like certain deep-seated national characteristics which came through the depression intact, zoning emerged as essentially the same institution it had been before—though in a radically altered context. And, too, it was simply growing older. Both of these considerations had their effects.

President Hoover was the product and eventually the public victim of an ideology which the crisis mocked as a cruel anachronism. His creed was “Rugged Individualism,” and throughout the thirties this was quite mechanically and deceptively equated with rampant *laissez faire*. But Hoover’s faith was not nearly so closely related to the traditional Spencerian doctrine and its intimate ties with the sacredness of property as it was to a strong view about public authority. He believed in “decentralized self-government.”¹ Perfectly aware from his war experience of the enormous possibilities of national power in a time of crisis, he warned that centralization of authority in time of peace “would destroy not only our American system but with it our progress and freedom as well.”²

It was therefore not surprising that he admired the development of zoning as a local institution. But in the very act of encouraging its growth through municipal government, he in effect undermined his own political philosophy. It was Hoover who as a federal cabinet officer had given zoning the extremely influential sponsorship of the central government. As Secre-

tary of Commerce he gave early evidence that behind America's urban needs lay a powerful impulse to find focus in Washington.

Hoover as President stimulated other examples of the growing tendency. One of the least known but most durable and influential achievements of his presidency was his sponsorship of a distinguished research project. This investigation uncovered massive proof of the acceleration of American urbanism. Its recommendations stressed the importance of central governmental planning to cope with the growing problems of America's cities. *Recent Social Trends*,³ the two-volume report of the President's Research Committee on Social Trends, was published in 1933 and contributed directly to the dramatic appearance of national planning as a central feature of the New Deal.⁴

Hoping to spur the building industry out of its serious troubles, in the midst of the depression Hoover had also summoned a Presidential Conference on Home Building and Home Ownership. The Conference's Committee on City Planning and Zoning prescribed large doses of planning and zoning for the cities of the nation while hewing to what was by then the orthodox line of recommending residential districts zoned for "homogeneous types of dwellings."⁵

Conventional as its recommendations were, the committee did resurrect a principle which had been at the heart of Ebenezer Howard's thinking some forty years earlier—a principle which apparently disappeared at the birth of American zoning, was revived during the New Deal, disappeared again after World War II, but by the 1960's was enjoying a notoriety unique in its American history. "City planning practice," observed the committee, "had been predicated upon endless city growth. Zoning regulations have been too liberal. The need for city planning and zoning is not based upon *growth* but upon a *very definite scale of growth*."⁶

The long-run effects of these quiet, scholarly efforts were considerably more impressive than Hoover's earnestly held political theory. The election of 1932 simply pulverized it.

The gravest economic crisis in American history was the opportunity for the cities of the nation to occupy the center of national political life. By the end of the thirties, the Democratic party "had become the first political party in the nation's history to be dominated by an urban-oriented ideology . . ."⁷ Through the unique leadership of a Hudson River farmer, urban interests were at last making effective claims upon the national gov-

ernment. It was during the era of the New Deal that the national government underwent extraordinary growth, a growth which either prospered at the expense of state and local governments or else was drawn into a vacuum which they simply could not fill. The grave truth was that American local government stood helpless in the face of the frightful depression. Indeed, between the 1929 crash and Roosevelt's election in 1932, it seemed that even Washington was impotent to deal with the vast crisis.

President Roosevelt used the opening moments of his first administration to bid farewell to ex-President Hoover and to Hoover's fundamental assessment of the nation's plight. The nation, Roosevelt said, was engaged in an enormous conflict. It demanded that people be given work, "treating the task as we would treat the emergency of a war . . . if we are to go forward we must move as a trained and loyal army willing to sacrifice for the good of a common discipline . . ." ⁸ Taking command of a nation which Hoover never conceived to be an army, Roosevelt announced that if the crisis continued and Congress did not respond adequately, "I shall ask the Congress for the one remaining instrument to meet the crisis—broad executive power to wage a war against the emergency as great as the power that would be given me if we were in fact invaded by a foreign foe." ⁹

Even though the New Deal never delivered anything like a mortal blow to unemployment, it fairly inspired a broad consensus that the paralysis of public action had ended and that the only authority with the will and the resources to do something about the crisis was in Washington. Long after its rain forest of programs and policies had withered, this conviction about the management of public affairs lived on as a great influence of the Roosevelt years. It permeated planning and zoning developments as well as the hundreds of other public concerns in which the nation was caught up during its long anguish.

The efforts to pull the country out of the economic abyss were frantic, improvised, inconsistent. For planning and zoning, too, it was a checkered performance. From its very outset the New Deal did not lack for interest in either, nor for an occasional vast and spectacular planning triumph of which the Tennessee Valley Authority was by far the most shining example. On the whole, however, the New Deal legacy to zoning added nothing to basic theory or practice. But what it did do was important.

For zoning, and municipal planning as well, there came to be a dependence on federal funds which was as unique as that for the great body of the

nation's unemployed. Federal relief funds were channeled into local planning agencies, which used them to help pay the salaries of staffs engaged in studies of such subjects as housing, traffic conditions, and rezoning. Without this assistance, there is a real question whether most of the planning staffs in the nation's cities would have survived. And with the new interest in "one-third of a nation," the work of these municipal agencies underwent a marked expansion outward from the usual physical concerns to the social problems of the city.¹⁰ Out of this work came additional recognition that the issues in America's cities were part of a large and complicated national experience.

At the heart of the episode which is known as the New Deal were men. To speak of the New Deal as having planning and zoning interests is actually to speak about men who had such interests and were able to get and use opportunities in the administration to promote them. In the booming twenties they had kept a national focus in Washington through the Advisory Committee on Planning and Zoning of the Department of Commerce. With the depression, the funding and staff of the committee virtually disappeared.¹¹ But the training and experience developed there were not lost, for at its very outset the New Deal created a new and greatly expanded theater of planning and zoning operations.

President Roosevelt called a special session of the 73rd Congress to deal with the national banking crisis. It convened on March 9, 1933. Before it adjourned, the "Hundred Days," as the session came to be known, produced legislation which not only reached into the nation's banking system but also deeply affected its agriculture, railroads, securities markets, and the unemployment problem. It was during this session that the T.V.A. was created. On the hundredth day, June 16, 1933, Congress passed the National Industrial Recovery Act which established the National Recovery Administration. Symbolized by a famous but short-lived blue eagle, its compulsory fair-trading codes rapidly bred widespread abuse and accusations that it was creating monopoly at the expense of the small businessman. In 1935 the Supreme Court held this feature of the act unconstitutional.¹² It was one of a group of such decisions which put the Court between the New Deal and its efforts at sweeping innovation. These frustrations eventually led to Roosevelt's effort in February 1937 to "pack" the aging, conservative bench through the power to appoint one justice for each one over seventy who had not retired. The widespread denunciation of his attempt revealed the special and durable reverence in which the

American public held the Court. Congress refused to adopt the plan but Roosevelt succeeded in getting the Court to loosen its grip on New Deal ventures.

Title II of the N.I.R.A. created a Public Works Administration to administer a fund of more than three billion dollars for the building of public structures and for major projects such as road construction. In conception, it was a "pump-priming" device intended to stimulate general buying power. It became a major source of funds, jobs, and programs which nurtured the zoning and planning movement in the United States throughout the depression.

At the outset of the P.W.A., Secretary of the Interior Harold Ickes, a graduate of the Chicago school of municipal reform, chaired an inter-departmental board to oversee the program. The National Planning Board was also established within the P.W.A. Appointments to this board went to Frederic A. Delano, Roosevelt's uncle and a prominent city and regional planner; Charles E. Merriam, a University of Chicago professor who was also an alumnus of the reform movement in that city; and Wesley C. Mitchell, a professor of economics at Columbia University. Its executive officer was Charles W. Eliot, II, a city planner with extensive experience as the director of planning for the District of Columbia's National Capital Park and Planning Commission.

In the beginning Ickes viewed the P.W.A.'s mission as a program to beautify the "national estate through the honest building of durable public monuments."¹³ Thanks to Roosevelt's ire over the incessant fighting for chunks from the rivers and harbors pork barrel, the original objective ballooned remarkably. Irritated because "There has never been any definite planning," F.D.R. proposed to "put the physical development of the country on a planned basis."¹⁴ Arthur M. Schlesinger, Jr., suggests that Roosevelt was now "thinking in terms of a 'permanent long-range planning commission' which could lay out a twenty-five- or fifty-year program for national development."¹⁵ The result was the creation on June 30, 1934, of the National Resources Board, an independent agency which Eliot had designed.

From 1934 into the midst of World War II, the National Planning Board underwent two transformations. Between 1935 and 1939 it was the National Resources Committee, and from 1939 to 1943 it was known as the National Resources Planning Board. Throughout the evolution Eliot continued as executive officer. The N.R.P.B. died in 1943 for lack of congress-

sional appropriations. Despite the metamorphosis of the original N.P.B. purpose, each of the planning agencies could trace a direct line of descent back to the zoning and planning movements of the twenties and earlier.

The 1933 board set the pattern for the coming years of federal zoning and planning activity. "Stimulation of State, city and regional planning" ¹⁶ was one of its first functions. Working through a self-developed field organization, it directed financial support into local governments from its own budget, as well as special-purpose allotments which had been earmarked in public works funds. It sent out consultants to more than half the states, and by the end of the first year it had a number of applications pending for such help for states which had had no previous planning experience. Like the earlier Hoover Committee in the Commerce Department, it was also furnishing advice on planning legislation. In addition, it had begun its own research operation in the broad field of planning. One of its areas was zoning controls. ¹⁷

By the end of the thirties certain effects were apparent. Almost 40 per cent of the nation's cities (and most of the cities of more than two hundred thousand) were restudying their city plans and revising their zoning ordinances. ¹⁸ Not quite as apparent was the significant expansion of a web of relationships being spun out between Washington and the cities of America. Although much of it came from the advisory and informational activities of federal agencies as varied as the P.W.A., the Army's Corps of Engineers (navigable waters), and the F.B.I. (crime control), the extent to which the central government was getting ever more enmeshed in local planning affairs was impressive. Correlatively, local governments were grasping at the many new opportunities to turn to Washington for brains and money. ¹⁹

To this development were added the reinforcing effects of higher education in America. As in many other fields into which the New Deal was drawn, the colleges and universities became an important source of intelligence for Washington. It was during this era that the floating academic made his first modest flight—the professor who was to pass increasingly between the traditionally compartmentalized worlds of education and government. Academic lawyers, planners, and architects began to divide their time between the two worlds until, a generation later, the worlds so overlapped that the division practically ceased to exist except in the fine print of university employment contracts.

Zoning and planning were settling into the curricula of the nation's system of higher education. Following Harvard's pioneering effort in 1929 in setting up a school of city planning financed by the Rockefeller Foundation, in 1933 the Massachusetts Institute of Technology established a five-year course leading to a Bachelor of Architecture degree in City Planning. Two years later it inaugurated a graduate program in city planning with a Master's degree, and in the same year Cornell began its planning school. Columbia University followed in 1937.²⁰

A still relatively small tide of zoning literature was also gathering. In the opening half of the thirties, for example, the Harvard University Press published ten volumes in its influential City Planning Studies. Three of them dealt exclusively or preponderantly with zoning. A good portion of a fourth volume was devoted to model zoning legislation. A fifth, which catalogued the entire planning literature produced between 1928 and 1935, was heavy with zoning entries.²¹ In 1931 the *Annals* of the American Academy of Political and Social Science spread the subject of "Zoning in the United States" across more than 200 pages.²² The regular fare for local government officials, notably in the monthly *American City*, was news of zoning developments around the nation.

Added to this growing national literature was that seemingly inexhaustible spring which every legal institution taps once it has been in the courts. There were already hundreds of published reports of judicial opinions flowing from the zoning litigation in the depression years. With the unique fertility enjoyed by American decisional law, the law reports were in turn siring their own progeny of articles, notes, and comments which burden the journals and busy the students of America's law schools. As early as 1930 there was enough of it to supply James Metzenbaum with the makings for his text, *The Law of Zoning*.²³ By the mid-thirties Bassett had produced the first edition of his text, *Zoning*,²⁴ which went to a second edition in 1940.

The plain statistics of publication were simply the tip of the enlarging iceberg. Beneath lay an unrevealed investment of time, resources, and human effort. Like all such endeavors in the law, the output exercised its inevitable tyranny on bench and bar. Forced by the insatiable demands of a discipline which deals directly with human problems, they had to stay abreast of it at the peril of denying the public its due. Zoning was working its way into the American legal profession.

A clue to the complexity of life in the United States is its apparently

boundless capacity to breed mutually contradictory generalizations about itself. The depression, the dramatic programs of the New Deal, the massive injection of federal funds, and the professionalization of zoning and planning did indeed have a centralizing effect which gave urban affairs a national focus they had never known before. The New Deal's repeated landslide victories also seemed to indicate that there was massive approval of the trend. Yet for planning and zoning, at least, the same years which produced this development also supplied equally credible evidence that the public was actually hostile or at least indifferent to the basic ideology of zoning and planning.

It may not have been a contradiction as much as it was a further demonstration that in America intellectuals do not often stand in the same relationship to their society as the brain does to the man. Like all people preoccupied with thought, the thinkers in planning and zoning spent most of their energy talking and writing to each other. But they rarely had their intended impact upon the nation. Their ideas and their language were either so abstract or so remote from the realities of American urban life that millions of Americans simply could not understand them. Or if they could, they did not believe them. Or, most disturbing of all, they did not act as if they believed them even if they did.

Suggestions of this dreary conclusion emerged from the Lynds' return visit to Middletown during the mid-thirties. That tissue of values which the Lynds called the "Middletown Spirit" held little if anything which seemed to square with the major tenets of the planner-intellectuals who had taken up residence in the New Deal. Unlike the thinking of Ebenezer Howard, which was to enjoy a marked revival during the New Deal, Middletowners raised no questions about the desirability of open-ended urban growth. The shock of the depression did not disabuse them of their belief that expansion was the other half of the progress equation. They tended to use quantity rather than quality as the index of progress. They opposed anything like the kind of broad-gauge planning which F.D.R. had in mind as a national policy. "It's impossible to plan on a large scale. There are too many factors involved. It is best to leave it to individuals, who are likely to take a more normal or more natural course." ²⁵

The Lynds speculated about possibly the greatest of all changes. Middletown was now putting a premium on playing it safe, looking for security although, as Lord Bryce had said about America at the turn of the century,

it had once lauded the spirit of adventure and innovation.²⁶ The crisis mentality of the New Deal, with its bold efforts to strike out in new directions, was not in keeping with Middletown's notion of how to foster progress.

As far as local planning and zoning were concerned, the big city was no more persuaded by the grand thoughts of the planners than Middletown. Small-town America might still have scorned life in the metropolis, but at least with regard to planning it agreed with its New York cousins. After nearly a decade of trying to run America's most unruly city, its scrappy mayor, Fiorello La Guardia, told a meeting of the American Society of Planning Officials in 1943: "You know, city planning is all right to most people, as long as you don't do anything about it."²⁷ His reaction to that attitude, like that of many New Deal planners, was simply to pay no attention but to keep on fighting to advance the cause of urban planning.

When Edward Bassett had a chance to speak about the same problem several years earlier, he came to the same conclusion. But the details of his experience lent even darker overtones to the picture of urban reality.

From nearly thirty cities throughout the nation a committee of the American City Planning Institute had gathered data which documented the enormity of residential overzoning. Bassett agreed with their conclusion that the possibilities for congesting urban America were genuine and simply absurd. He felt that drastic revisions of zoning ordinances were needed all over the country. He was then involved with a committee trying to get the same result in New York. "Now how to get results," he asked.

Let us say that this committee in New York City goes before the Board of Estimate, and says: "We have worked out very carefully these desirable changes of cubage that will make less density, and changes to residence instead of business." The presiding officer says: "Whom do you represent?" "I don't represent anybody except this body that has studied this subject all over the city." "Well, don't you represent any property owners?" "No, I don't represent any property owners." "Those opposed arise," and perhaps three hundred property owners arise, and the presiding officer says: "Don't you think you had better get a petition or have a meeting to start the ball rolling in order to bring about your ideas?" All right; we will hold meetings, and the meeting is advertised, let us say in Flatbush. Nobody comes to the meeting. Why not? Because no one is interested among the property owners in discussing the density or decreasing the allowable height. It is one of those difficult things to get started.

I think I am able to say that the zoning of the United States to the extent of nine hundred and ninety-nine parts out of a thousand is what the average informed real-estate owner of that district will stand for. It is simply remarkable why those things which you work out ought not to penetrate more quickly.²⁸

This dialogue put it with consummate precision. The ownership of urban property bred an intensity of self-interest which was utterly lacking when ownership was lacking. And it was a national trait.

This was probably as pessimistic as anything said about zoning during the thirties. Because it was the judgment of the most distinguished member of the movement, it was particularly disquieting. But this was only a very small portion of the extensive criticism which appeared during the era. Much of it came from men of similar stature.

Early in the depression Harland Bartholomew had also remarked upon the civic disinterest and real estate speculation which frustrated constructive planning in his town, St. Louis. Zoning had been warped out of scale. It "overemphasizes the protection of certain better type residential districts and either ignores or seldom effectively controls the distribution of population in accordance with reasonable standards."²⁹ The administration of planning and zoning was incompetent. "We have not yet developed a distinct municipal administrative profession of the character and quality enjoyed by English cities or for which the cities of Germany were so favorably known before the war."³⁰

In 1937 the National Resources Committee joined with the American Society of Planning Officials and the American Planning and Civic Association in sponsoring a National Zoning Conference in Chicago. The extensive proceedings,³¹ now buried in archival dust, are an important document in the history of American zoning. From them emerges the accumulated professional judgment of what the institution had become after a generation of growth and application. The account was no more enthusiastic than Bassett's.

The N.R.C.'s executive officer, Charles W. Eliot, II, raised the old no-planning refrain. "Where zoning has broken down, the original zoning plan was often mistaken for a general plan. The tail wagged the dog; methods were mistaken for objectives."³²

Alfred Bettman, also now affiliated with the N.R.C., repeated the refrain but added something which is as important to the judgment of a legal

institution as the theory which underpins it. What, he asked, was the actual impact of zoning? In a nation in which every state had now enacted some form of zoning enabling legislation ³³ and in which some three-quarters of its entire population was subject to zoning controls, there was no answer to the question. No one knew what in fact it was accomplishing when measured in terms of the economy and efficiency of public works and services, in terms of the stabilization of land values, or ultimately in terms of the quality of urban life.

Furthermore, an available body of information disclosed that the administration of zoning laws was undermining the principle of districting. The courts and city councils, and the local boards of adjustment, which were intended to ease the hardships of excessively rigid applications of the law, were breaking down the integrity of the zoning district. "The statistics of the number and kinds of these variances, judicial decisions and councilmanic single-lot or small-vicinity amendments, show that in actual practice the basic theory of regulation by districts has not stood up under the pressure which has been exerted in favor of dealing with individual lots. The City Council of Chicago passes about 1,000 zoning amendments a year." ³⁴

From Milwaukee came a report which was also symptomatic of a national condition. There were large numbers of land uses developing in violation of the classifications established under the zoning law. During the twenties, and then under the strain of the depression, small businessmen gave up establishments like beauty parlors, barber shops, and real estate offices and conducted their businesses in their homes, which were in zoning districts where such uses were prohibited. It was estimated that some 80 per cent of these violations had occurred after Milwaukee passed its ordinance in 1920. The authorities feared that if they cracked down on so many violators, the entire ordinance would be put under a moratorium until the depression ended. ³⁵

Milwaukee had other problems too. Even if the new technology helped to reduce the problems of light and air, it turned out that height control was by no means an automatic control over population congestion. The tallest structure in the city, the Wisconsin Telephone Company, had some twenty-five hundred employees entering and leaving during a long working day while a one-story, five-and-ten-cent store generated six times as much traffic in less time. ³⁶

The National Zoning Conference of 1937 produced no answers which

had not been offered before. In retrospect, it was that lack of novel solutions for settled and worsening problems which made the conference particularly depressing for the future of the institution. And the future of the city itself seemed even more ominous. As Bartholomew warned: "We are confronted first with the problem of what to do about current population movements toward the suburbs, so extensive that our cities are rapidly disintegrating."³⁷

Earlier in the depression, while serving as president of the National Conference on City Planning, Bartholomew had cut closer to the heart of the matter. "In our American cities of today, we are well organized to promote trade and commerce, to lunch and sing and rotate together, in fact to do most anything except the very important thing of planning our environment . . . As someone has said, we have not truly accepted urban life. The automobile has contributed to this delusion of individual escape."³⁸

Bartholomew seemed to have given up on the great cities of the country. Believing that conditions were generally better in the smaller urban centers, he looked to them as "the hope of America."³⁹ He had quite an elastic concept of what a smaller city was—twenty-five thousand to five hundred thousand people. He seemed to intimate that in the smaller size was a manageability absent in the huge cities. One could find the same quality of manageability in America's suburbs. There were other features about the suburbs which, like manageable size, were closely tied to the original theory of zoning and the intellectual history of which it was an important part. However they wavered, a number of their lines ran back to the garden city and forward into the New Deal.

Suburbanization, one of the fundamental movements of America's twentieth century, is both a process and a value-charged term. Once the connotations of snobbery and flight from urban responsibilities are withdrawn, there remains a residue of features which the mass of suburbs demonstrate either as physical fact or a way of thinking.

Measured against their nearby cities, suburbs are kept deliberately small and finite. In an important spatial sense, they are away from the city, a place apart. If they have a symbolic color, it is green. They enjoy open space, typically around their pivotal symbol of the individual home, and usually in and about the town as well. Physically and socially they are healthy places to live.

While assuredly not the whole picture, these qualities are all important

fragments in the mosaic of Howard's garden city. When the New Deal resurrected the garden city, it came to the policy against a surprisingly large American background of experience with wholly planned communities. Suburbia, the garden city, and zoning were all parts of that experience.

In terms of population, the nation's planned communities were never more than a very small aspect of national life. Yet by the late 1930's there were so many that the National Resources Committee was able to conduct studies on one hundred forty-four of them.⁴⁰ These communities were "unlike the ordinary city . . . constructed from the start according to a more or less comprehensive physical plan."⁴¹ They were isolated communities, villages, satellites of great cities, or simply well-defined neighborhoods within a larger urban setting. Most of them were suburbs.

They had varied sponsorship. Over half were developed by industries motivated by needs for a stable supply of labor and ready access to markets, power, or raw materials. The majority of these communities had been built by firms producing textiles, coal, steel, and pulp and paper. They were in locations as widely separated as Tennessee (Alcoa, 1916), Wisconsin (Kohler Village, 1913), and Washington (Longview, 1922).

Hopedale, Massachusetts, had been started in 1841 by Adin Ballou, an obscure utopian in the Christian Socialist movement. In 1912 Frederick Law Olmsted's plan for Torrance, California, was executed by a speculative developer who was attempting an early effort to decentralize Los Angeles industry. Palos Verdes Estates, near Los Angeles, was begun in 1923 on the design of the Olmsted brothers. By the late thirties it was thought to be "one of the best-planned and most carefully restricted real estate developments in the country."⁴² During World War I, the federal government had built emergency towns to meet housing needs near major industrial centers like Philadelphia and Newport News. In 1930 the government laid out Boulder City, Nevada, to house construction workers on the Boulder Dam and then the permanent community which followed. In 1933 the T.V.A. established Norris, Tennessee. Philanthropic agencies, too, had taken a hand in the movement. Begun in 1923, Mariemont, Ohio, was fashioned from the garden city idea.

Whether started before or after 1898—the year Ebenezer Howard published his *Tomorrow: A Peaceful Path to Real Reform*—all these efforts had something about them which could be found in the vision of the garden city. But the most direct and powerful link between Howard's ideas

and a full-scale attempt to build a garden city in the United States was fashioned by the imaginative, idealistic Regional Planning Association of America which men like Henry Wright, Clarence Stein, and Lewis Mumford had founded in 1923. Driven by a sense of the humane possibilities of industrial civilization, Stein went to England after World War I. As he tells it, "Up to that time in America our attack on housing had been regulatory—legal don'ts. I went abroad in search of more constructive action. In England 'New Towns' and 'New Towns after the War' were attempting to chart a new way; the second garden city, Welwyn, was being built. I returned to America a disciple of Ebenezer Howard and Raymond Unwin."⁴³

By the time of the New Deal, planner-architects Stein and Wright had made two historically important efforts to advance the cause of the garden city. The first, ostensibly a housing development, was Sunnyside Gardens in Long Island City, across the East River from Manhattan. It was done between 1924 and 1928.

Sunnyside was seventy-seven acres of an intriguing and enormously ambitious effort. Stein described it as a "laboratory, an experiment, a voyage of discovery, and an adventure."⁴⁴ In terms of its physical objectives alone, it was all of these things. But it also had the considerably larger overtones of a quest for the redemption of a dream which has quickened and eluded all of American history: peace, beauty, democratic community.

Out of a wise physical plan, Stein and Wright hoped to create economical housing in a setting of large open spaces where amenities like sunlight and fresh air could be preserved. Hampered by a gridiron street layout which the borough engineer would not allow them to touch, they developed common green areas within the blocks and gave the homes prospects on common green areas and courts. In his deeply touching *Green Memories*, Lewis Mumford, who lived in Sunnyside for eleven years, described the effect. "So, though our means were modest, we contrived to live in an environment where space, sunlight, order, color—those essential ingredients for either life or art—were constantly present, silently molding all of us."⁴⁵

Since it was within New York, the land was subject to the city's zoning controls. As it turned out, most of it had been held by the Long Island Railroad for possible yard expansion. It was therefore classified for industrial use under the zoning law, the bottom of the pyramid of uses where just about anything could be done on the land. Stein said that had it been classified for residential use, the mixture of housing types of varying den-

sity and height—single-family homes and apartment houses—would have been prohibited. Instead, the designers were left free to work out the best aesthetic solutions for Sunnyside's large objectives. "In spite of the speculative operators," wrote Stein, "fear of such indiscriminate grouping, and the zoners' preoccupation in keeping dwellings of similar types together, we found this did not cause sales resistance. I have heard of no social difficulty resulting from it."⁴⁶

In 1929 the team which had made Sunnyside turned to designing and building a complete garden city ten miles from Manhattan—Radburn, New Jersey. The depression wrecked Alexander M. Bing's limited-dividend City Housing Corporation and left, not a garden city, but a suburb for it lacked the essential features of a protective green belt and its own economic base. But by its imaginative arrangements of houses, roads, parks, and gardens, the planners of Radburn had taken another important step and had put the automobile into a more civilized relationship with a residential community. They had done so by deliberately bucking the tradition of impermanence in America's neighborhoods which zoning was supposed to have prevented. Stein wrote:

To plan or build roads for a particular use and no other use required a predetermined decision to make specialized use permanent or rather long-lived. That was contrary to the fundamentals of American real estate gambling, to serve which the pattern of ordinary highways had become the basis of city planning. I say this in spite of the fact that the 1920's were the heyday of zoning. None of the realtors, and few city planners who accepted zoning as their practical religion, seemed to have faith enough in the permanency of purely residential use to plan streets to serve solely that use. No, not even when the economy of so doing was clearly proved by Henry Wright and Raymond Unwin. Zone for dwellings? Yes, but don't give up the hope that your lot may be occupied some day by a store, gas station, or other more profitable use.

The Radburn Plan proposed to protect the residents, 1st, by planning and building for proposed use, and no other use; 2nd, by private restrictions rather than by wishful zoning.⁴⁷

If zoning fell by the wayside in Radburn, the basic problem of keeping control of land use did not. Radburn's attempt to take a firm hold through private restrictions was both a reversion to the method of pre-zoning days and an alternative way to reach the objective of residential stability which first animated the zoning movement. It was that objective which had to be gained if the garden city or other planned communities were ever to

survive once they were built. Not surprisingly, in its investigation of thirty-five planned communities, the N.R.C. had found the same problem everywhere. It was usually handled by zoning controls, or a mixture of zoning controls and deed restrictions.⁴⁸

Whether used alone or in concert, zoning was a tool, an instrument for a plan, and if it was to succeed, it had to be used that way.

Municipal zoning and building codes and private deed restrictions have been generally adopted for the benefit of planned communities. In some cases, the plans themselves, according to which these communities were constructed, have been their principal protection against undesirable developments. In fact, the plans have often served to protect the legal restriction from pressure for change, owing to the fact that the plan met the current use perfectly but was ill-adapted to any other use. Further, a well-articulated plan has been found to stimulate public support against encroachments. The community must be protected by both the plan and by legal restrictions.⁴⁹

In 1935 the idea of the garden city ended its long wait in the ante-chambers of national policy. Under power granted by the Emergency Relief Appropriation Act of 1935, President Roosevelt issued an executive order establishing the Resettlement Administration. Among its responsibilities was the resettlement of impoverished rural and urban families. Rexford G. Tugwell, then Under-Secretary of Agriculture, was appointed the R.A.'s administrator. A charter member of F.D.R.'s "Brain Trust," and a practitioner of the brittle, iconoclastic style of the 1920's intellectual, he came from a professorship in economics at Columbia University. Fragments from a poem of his earlier years hinted at the breadth of his approach to public problems:

I am sick of a Nation's stench,
I am sick of propertied Czars,
I shall roll up my sleeves—make America over! ⁵⁰

"My idea," wrote Tugwell, "is to go just outside centers of population, pick up cheap land, build a whole community and entice people into it. Then go back into the cities and tear down whole slums and make parks of them." ⁵¹

To this prescription Arthur M. Schlesinger, Jr., attributes the origin of the Greenbelt towns. Clarence S. Stein said that Tugwell was a fervent

believer in Howard's garden city.⁵² In any event, through its adjunct prophetically called the Suburban Division of Resettlement, the R.A. began to design new towns for the poor. Working in a lavish mansion for lack of other space in Washington, the R.A. produced three towns, Greenbelt near Washington, Greendale close to Milwaukee, and Greenhills outside Cincinnati. Each was an impressive exercise, yet none was a finished demonstration. They ended up being basically dormitory suburbs rather than towns with an economic base rooted in their own industries.

If they failed to give America a consummation of Howard's dream, they succeeded in taking several long steps in that direction. The greatest of these, yet the least tangible of all the accomplishments, was the first engagement of the federal government in the problem of creating a new basis and a new form for the nation's urban life.

The depression was a time of hungers. Not all of them had been gratified by the end of the thirties. The craving for a fresh, regenerated urban life was never more intense than in 1938 when Lewis Mumford published *The Culture of Cities*,⁵³ that unique synergy of passion, history, polemic, and humanity which is one of the important books of the twentieth century.

The zoning institution was not immediately affected by the brief federal episode in town building. Indeed, from Stein's point of view, the best thing about zoning was its absence as a control on the raw land which had been developed under the single ownership of the national government or a private firm like the City Housing Corporation at Radburn. "Experiments such as the Radburn Idea never could have been realized within the framework both legal and physical, that has circumscribed the city planner's thinking and activities. At Radburn we were able to work on a clear slate because we got there before the zoners and the subdividers and the municipal highway engineers. Their immovable framework would have held up progress there, and afterwards, at . . . the Greenbelt Towns . . ." ⁵⁴

But the effort to start with a "clear slate" did eventually have an important effect upon the institution. It would come in its time and carry zoning out beyond the aging cities and the aging thought in which it stagnated until America passed through the second great cataclysm of the twentieth century.

In a half-century there had been changes in quality and quantity so enormous that it seemed as if America had been made over into a different civilization.

A Roman Catholic had been elected the youngest President of the United States. By traveling through the vacuous eye of a common household device, millions of Americans were able to attend John F. Kennedy's inauguration. Like the day, his address glistened with an icy austerity.

A thousand days later millions more of his countrymen began a living-room vigil which ended when they laid him in his grave at Arlington Cemetery, then switched off their television sets and something in their lives as well. Intending to pay a supreme tribute, visiting foreign officials were so moved by the stateliness of the President's funeral that they said America had at last shown the capacity to behave like a great monarchy. But in their agony Americans may have seen that a people who could harbor the wickedness to slay four of its leaders in five generations yet suffer a national tragedy with transcendent dignity had a terrible majesty that came, not from an age of kings, but from the Old Testament.

In considerably less than a decade the fantasy of penetrating outer space had become a reality relegated to the inside pages of the daily press. Children played astronauts just as casually as they played cowboys and Indians. The moon had become little more than a target at which Russians and Americans, with routine accuracy, hurled objects whose complexity was as incomprehensible as the forthcoming landing of man there was certain. Except for the staggering demands of the military budget, it was pre-eminently the one great public effort for which money had ceased to be a deterrent.

In 1967 a clock in the lobby of the Department of Commerce ticked off the arrival of the two hundred millionth American. President Johnson used the occasion to recapitulate two hundred years of national history. He saw it through three epochal questions. "Shall we be a free nation?" He said that the American Revolution had answered "Yes." "Shall we be one nation?" The Civil War had answered "Yes." "Shall we be a humane nation?" The Depression had answered "Yes." The question confronting America in the next century was "Shall we be a great nation?" He could not predict the answer.¹ Teddy Roosevelt would have had no such difficulty.

Something which did give Roosevelt trouble was a White House dinner in 1901 to which he had invited Booker T. Washington. The South was outraged and raised a storm of protest. A Senator warned: "The action of President Roosevelt in entertaining that nigger will necessitate our killing a thousand niggers in the South before they will learn their place again."²

Today, among two hundred million Americans, there were four Negroes: a United States Senator, a Justice of the Supreme Court of the United States, a federal cabinet officer, and one who was elected mayor of Cleveland by defeating a grandson of President William Howard Taft. But like millions of those tabulated, there were six million uncounted Americans whose surrealistic lives defied all the answers President Johnson had found. Most of them were also Negroes. Most dwelt in the cities.³ In the richest nation in man's history they had disappeared into a limbo where, rootless, poverty-stricken, and despairing, they were invisible to a society which had equipped itself to see even to the far side of the moon.

After some fifty years of zoning's growth, history offered no ribbons to tie or circles to close, but only change as unrelenting for the institution as for the nation. In retrospect, important struggles early in the century seemed extremely remote.

The most striking example was the forgotten fight over the skyscraper, now a standard fixture of cities all over the world. Early in the century American architects had summoned generations of European tradition in an attempt to groom and polish America's unkempt city building. A half-century later those seemingly deathless aesthetic principles which tied building height to street width were being jettisoned in a Europe which once scorned the skyscraper.

They were sprouting from the cores of Germany's bombed cities, in booming Milan, at the very heart of Warsaw, in ancient towns like Delft and Rotterdam and brand-new ones like Stevenage and Harlow. It was

impossible to see Westminster Abbey whole without having a skyscraper pierce the prospect. Lower Manhattan, where the skyscraper had raised its decisive pressures in 1913, was undergoing a new wave of building which could only be compared with the first wave which burst there at the turn of the century.⁴

The richly ornamented Singer Building on lower Broadway, which John Marin found so provocative a subject for the watercolors he hung at the 1913 Armory Show, was marked for the wrecker's ball. In 1908 it held the title of the world's tallest building. In 1968 it held the title of the world's tallest demolition project. Its architect, Ernest Flagg, had said it was "as solid and lasting as the Pyramids."⁵ Something larger was planned in its place, and several blocks away the latest record holder was under construction. That effort, the World Trade Center, would not only top the Empire State Building, but would do it doubly with a pair of 110-story towers.

Many of the early arguments against the skyscraper were just as strong fifty years later; but like the first efforts to contain the growth, they too had been abandoned. Where Louis Sullivan had found its justification in a mystical, two-fisted aesthetic, the noted French urban geographer, Jean Gottman, now explained it as "an expression of the social evolution of employment, of the labor force today."⁶

Fifth Avenue, too, once again faced a new era. The great cost of land and rents associated with the arrival of the high-class retailing establishments was now forcing them out or keeping others from coming in. The 1960's were marked by the gradual disappearance of retailing on the mid-stretch of the avenue as airlines, banks, government tourist offices, and showroom centers came in with a willingness and ability to pay the rising costs of doing business there. As it had been since the commissioners of 1811 laid out the line of Fifth Avenue, the movement was northward. There was a developing belief that shops would soon begin to show up north of Fifty-ninth Street.⁷

In a curiously ironical way, Paris was demonstrating that dramatic urban change was the monopoly neither of America nor of America's largest city. When the Fifth Avenue fight was going on early in the century, the French capital was repeatedly cited as the exemplar of urbane, dignified stability. The chic Parisian shops and luxurious boutiques along the great boulevards were the standard to which Fifth Avenue merchants aspired. Once they got zoning controls they promised to duplicate the elegance.

In a half-century the famous carriage trade shops along the Champs Elysées were being pushed out by the same kind of land economics churning on Fifth Avenue. In Paris, too, their places were being taken by tall office buildings.⁸

The skyscraper was just as indifferent to the bodies and souls of its French victims as it was to those in the United States. Les Halles, the vast, jumbled central market of Paris with its early morning scene out of Daumier's sketch pads and its beloved tradition of hearty bistros, was slated for destruction. The prospective replacements were skyscrapers which would far outreach the towers of nearby Notre Dame. The old Montparnasse Station was also scheduled for leveling. On the site would rise Europe's tallest skyscraper.⁹

At Fifty-ninth and Fifth, where the Savoy Plaza once stood, General Motors had raised a 48-story skyscraper to confront the dowager Plaza across the way. It was a new landmark, but even more the statement of another monumental achievement for industrialism. In 1967 General Motors produced its one hundred millionth vehicle. The rate of achievement was as spectacular as the huge statistic. The first twenty-five million took thirty-two years to produce; the second twenty-five million were made in fourteen years; the third in eight years and the most recent in five years.¹⁰

Like the skyscraper, the automobile had become an international experience. Honking and crawling through every Roman piazza and Parisian traffic circle was evidence that the materialism which was Europe's orthodox interpretation of American civilization was in reality not peculiarly American at all. All that America had done was develop a genius for creating mass opportunities to gratify a universal craving.

The car's blessings were very mixed. It generated millions of new jobs, poisoned the air, gave unprecedented mobility to ever more people, strangled cities, and did all these things with remorseless acceleration.

Easily the greatest cause for mankind's alarm was thermonuclear war, a term as foreign to the early twentieth century as horse-drawn artillery was to the concluding years. The specter of warfare incinerating vast segments of life on earth and mutilating the genetic structures of much that might survive was something which man never had the opportunity to contemplate before. If he managed to escape that fate, he was being warned of mass destruction that could come by the antithetical process of human reproduction.

It may still have been a time of hope, but Americans looked upon the

future through glasses their grandfathers never wore. No one talked of an age of gold. The hard edge of urban life was no longer softened by nostalgia for the farm. There were no sweeping claims for new legal institutions which could solve domestic problems as novel as narcotics and ancient as slums. Too many troubles seemed intractable. Too much music seemed atonal.

Like the Census of 1890, out of which Frederick Jackson Turner extracted so much, the 1960 count was another important signpost. In 1890 there were about sixty-three million Americans.¹¹ In 1960 there were almost three times as many.¹² In 1890 the urban population was 35 per cent of the national total. In 1960 the figure was nearing 70 per cent.¹³

The country was undergoing what was in fact an international convulsion, more easily measured than understood, an experience so profound that in just fifty-five hundred years since cities first arose there had appeared in the twentieth century what Kingsley Davis called "a new and fundamental step in man's social evolution . . . The large and dense agglomerations comprising the urban population involve a degree of human contact and of social complexity never before known. They exceed in size the communities of any other large animal; they suggest the behavior of communal insects rather than of mammals."¹⁴ He calculated that if the 1950-1960 rate of urbanization continued, by 1990 more than half the entire population of the world would be living in cities of more than one hundred thousand people.¹⁵

In the United States the rising rate of growth in population and urban areas was directly connected with another movement. In 1960 the great cities of the nation were showing signs of a change possibly as fundamental as the disappearance of the frontier. A titanic remaking was going on, and out of it was coming a vast new setting for life, the suburbs. Zoning was inextricably involved in this transformation.

During the late stages of the 1960 presidential campaign, Theodore H. White made a night flight from Florida to New York on a Kennedy press plane which he described in his excellent book, *The Making of the President 1960*. He went forward to talk with the pilot. "It used to be, said the veteran pilot, looking out on the carpet of twinkling cities (the red-green-blue neon lights knotting at all the crossroads far below), it used to be that you could fly visually on a clear night like this. You could pick up Norfolk from the air, then you could recognize Washington, then you could

recognize Baltimore, and all the way up to Boston it was that way—one city, then the next. Now, he said, there was just a continuous belt of night light from Newport News north, and you couldn't locate yourself visually; you had to do it by instruments."¹⁶ What he was describing for the northeastern seaboard was that continuous stretch of cities and suburbs which would shortly be called "Megalopolis."¹⁷

The 1960 Census showed how this kind of unprecedented filling-in was taking place across the country. Virtually all the largest metropolitan areas throughout the nation were shrinking at their centers, losing population on an outgoing tide. Yet between 1940 and 1960 over seventeen million Americans moved from the farm. That was more than the whole vast flood of immigration to the United States between 1894 and 1914.¹⁸ Whether destined for large or small cities, the mass movement from the farm was part of the overall change in which the nation was becoming increasingly urban.

Yet it was growing less big-city urban. In 1950, 12 per cent of the whole population lived in places of more than one million people. The figure dropped below 10 per cent in 1960.¹⁹ In the half-century since zoning began, the proportion between dwellers in the cities of a million or more and the entire urban population was also changing at the expense of the great cities.²⁰ There were endless ways to express the enormous change, but possibly the bluntest statement was that between 1950 and 1960 the population had expanded by twenty-eight million and two-thirds of that growth had occurred in the suburbs.²¹

In *This U.S.A.*, their extensive study of the findings of the 1960 Census, Ben J. Wattenberg and former Census Director Richard M. Scammon drew a portrait of suburbia which in many ways statistically confirms its stereotyped image. In some of the findings are intimations of why, after half a century, the zoning institution was so deeply rooted there.

Comparing three areas—rural, suburban (or fringe), and central city—Wattenberg and Scammon noted that suburbanites were the wealthiest. They had the highest median family income, with more families earning \$10,000 or more and fewer families with incomes under \$3,000. They had the highest percentage of families with children but a fertility rate about the same as the city's dwellers. They were the most educated and had the lowest rate of unemployment. Theirs was the highest percentage of workers in white-collar callings. They were the most likely to own rather than

rent their homes. Suburban homes were newer than urban homes, and the homeowners in suburbia were younger than those in the city. More suburbanites came from some other place than did city dwellers. Suburbia had many fewer Negroes than the city.²²

Suburbia was, in short, a mighty fortress of middle-class America, and in the 1960's it cast its lengthening shadow on everything from automobiles to zoning.

It was never a part of the justification for zoning that it would give citizens unique experience in participating directly in government. Yet it did just that once the suburban boom got under way. With the obvious exception of taxation, no other aspect of suburban local government during the post-World War II era generated steadier bursts of intense public interest. If a resident had never served on a jury, zoning may well have given him his most direct contact with the process of law in his community. It was a rare suburban neighborhood that had never been stirred by angry citizens circulating petitions to the zoning board of appeals or town council. Probably every adult had firm opinions about the institution. Whether he saw it as a shield or as a sword, he knew that it had something important to do with the way of life which had led him to the suburbs or kept him there.

His regular reading constantly reminded him of this. Week in and week out he was served zoning news in the suburban press, an important new force in American journalism. The fact that the zoning story was published next to one about the garden club or the high school football game was exactly the kind of exposure which sustained the community's sensitivity to it. So, too, his neighbor or fellow-commuter may have sat on the board of appeals or been a town councilman. This put the suburbanite in the position of having something which he rarely got in the great city and was even less likely to have with his state or federal government, a face-to-face opportunity to measure and influence those who made decisions about an important part of his life. Blending one of his most vital interests, his home, with local sensitivities about the neighborhood, zoning steadily nurtured civic interest and involvement.

It was not only the local press which kept the subject warm. National publications showed a rising interest in it. Newspapers like the *New York Times* and the *Wall Street Journal*, and magazines such as *Time*, *Look*, and *Harper's* ran zoning as top news and cover stories.²³ Even a more

enduring literary form dealt with it. *Peyton Place*,²⁴ a new species of post-war novel as well as an early straw in the wind of cultural change, made the subject of zoning a part of its adult entertainment.

The public interested in zoning was by no means exclusively suburban. Within the great cities were areas with a sociology and points of view indistinguishable from those in many of the suburbs. In 1967, for example, the Philadelphia City Planning Commission conducted a zoning remapping of the entire city. In an effort to sound out local attitudes, staff members of the commission attended a public forum devoted to the project. A resident of Philadelphia's Chestnut Hill section announced that in his community "everyone thinks everything should be zoned R-1,"²⁵ the most restrictive residential classification in the Philadelphia ordinance. Tied in with this standard suburban desire for restrictiveness was a closely related strategy of "upzoning" or "upgrading" zoning districts by imposing stricter conditions in the district, for example, by requiring a larger lot size for single-family homes. As another Chestnut Hill resident said: "One of the reasons to upgrade is to give us control on the theory that we can then always refuse to oppose a request for a variance."

To these demands the executive director of an important local civic organization reacted by charging: "You talk like [the area] is a village." Unintended as it was, his listeners almost certainly took the criticism as a compliment.

In the spring of 1967 the *New York Times* ran an extensive front-page article²⁶ surveying the zoning situation in metropolitan New York. Covering the region, which includes areas of New York, Connecticut, and New Jersey, the findings revealed conditions which could have been found in metropolitan regions all over the nation. "Important battles over zoning are being fought in New York's suburbs. The outcome will determine the physical environment of the communities and, to a large extent, their quality of life."

At the time of publication, eight million people lived in the region. Thirteen million were expected in another generation. In the face of that forecast, many suburbs were upgrading their zoning districts by raising the minimum size of the lots on which homes might be built, thus making further settlement more difficult and expensive. Between 1950 and 1960 five counties in the region had more than doubled their average minimum lot size. By tightening its local codes, in just over a decade Westchester

County had reduced the residential zoning envelope of its several communities from three million residents to less than two million.

Zoning had become one of the most heated political issues in the suburbs. A property owner in Greenwich, Connecticut, who could not get permission to change the use of his land from residential to commercial, said that in his town "no one can get elected unless he swears on the Bible, under the tree at midnight, and with a blood oath to uphold zoning."²⁷ In nearby Norwalk a civil rights group had started a lawsuit to prevent any further upzoning, claiming that its economic effect would bar Negroes from settling there.

Events were pulling the institution of zoning into a larger setting, emphasizing connections with its culture that had been present from the beginning as they are for any legal institution. It was becoming more difficult to think about it simply as a dull piece of legal machinery rattling away in hundreds of local governments. In the autumn of 1967, the same region reported that in a single year the price of suburban housing had risen as much as 20 per cent. The cause was a combination of tight mortgage money, large-lot zoning, and the racially explosive summer in Newark and Plainfield. Following the riots, those New Jersey cities saw unusually high numbers of their citizens fleeing to buy homes in the region's suburbs.²⁸

The remarkable thing about these developments was that public interest and disquiet about zoning was rising in direct proportion to the success of some of its most venerable intentions.

Zoning had made its first great American appearance on Fifth Avenue by means of an unsophisticated showing of financial strength, secured with the backing of the police power, and then used as an exclusionary device. In another half-century the institution was being used in a much wider setting but often with comparable style and effect, doing for suburbanites what it had done for Fifth Avenue's retailers.

But now, to recall Holmes's great insight about law, there had been changes in "the circumstances in which the public force [had been] brought to bear upon a man through the Courts."²⁹ Nineteen-sixteen was a long time ago. Whether its deepest convictions were affected or not, the public was being made aware that zoning, like a number of other settled institutions, had implications which did not square with the democratic dogma. New labels were coming into use, names like "snob zoning." A lawyer involved in a fight to break a four-acre minimum lot district into half-

acres for middle-income families called the effort "Ivy League socialism,"³⁰ a use of the police power to benefit the rich.

Of all the litigation which developed after World War II, none involved more public and judicial vexation than those cases which smacked of snob zoning.³¹ Typically a phenomenon which occurred at the cutting edge of urban expansion, it brought into sharp conflict the growing population's demand for suburban housing and the desire of low-density rural or suburban communities (often wealthy) to stand fast against the outward push. When the low-density suburbs were able to hold out by keeping their zoning rigid, they were leapfrogged by developers who, seeking land for housing operations, frequently added to the metropolitan sprawl characteristic of the era.

The devices typically used in snob zoning were controls over the size of building lots and the floor area of buildings. Each is a potentially effective device for controlling population density, a legitimate objective of zoning law. Also in theory, such controls might validly be used to implement community plans which took account of problems of light and air, recreation, water supply, and sanitary sewers. But these defenses for low-density zoning often masked other reasons anchored in powerful desires to live in socially or economically homogeneous communities.

A dissent in a celebrated New Jersey case upholding minimum dwelling-size regulation in a sparsely settled township protested against the consequences of snob zoning. Mr. Justice Oliphant said:

Zoning has its purposes, but as I conceive the effect of the majority opinion it precludes individuals in those income brackets who could not pay between \$8,500 and \$12,000 for the erection of a house on a lot from ever establishing a residence in this community as long as the 768 square feet of living space is the minimum requirement in the zoning ordinance. A zoning provision that can produce this effect certainly runs afoul of the fundamental principles of our form of government . . . It should be borne in mind that the threat to the general welfare and health of the community usually springs from the type of home that is maintained within the house rather than the house itself. Certain well-behaved families will be barred from these communities, not because of any acts they do or conditions they create, but simply because the income of the family will not permit them to build a house at the cost testified to in this case.³²

In 1966 the Supreme Court of Pennsylvania struck down a four-acre minimum provision in a zoning ordinance of a Philadelphia suburb.³³ In language which revealed a rising national judicial exasperation with zoning

problems generally, Mr. Justice Roberts wrote for the majority: "The days are fast disappearing when the judiciary can look at a zoning ordinance and, with nearly as much confidence as a professional zoning expert, decide upon the merits of a zoning plan and its contribution to the health, safety, morals or general welfare of the community. This Court has become increasingly aware that it is neither a super board of adjustment nor a planning commission of last resort." ³⁴

Having disposed of a number of sophisticated arguments offered in defense of the regulation (for example, the regulation had a greenbelt effect), the court reached the heart of the matter. "A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid . . . What basically appears to bother [certain resident defenders of the regulation] is that a small number of lovely old homes will have to start keeping company with a growing number of smaller, less expensive, more densely located houses. It is clear, however, that the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive and exclusionary." ³⁵

The way the suburbs were applying zoning also rankled and worried officials in larger units of government. They wondered where the growing population would find housing. Yet sometimes its application in the suburbs was as near as the nation had ever come to perfecting the principle of limits which had fired the enthusiasm of the early twentieth-century reformers. Here were effective legal planning controls shaped upon a deliberate design to hold the community to a certain size. However important the component of snobbery or parochialism may have been, there was also something else of significance in the way the institution was being applied in the suburbs. It was an instrument for a number of perfectly honorable ends: keeping the size of school populations manageable enough to insure quality public education, retaining the amenity of open space, or sparing the community the irrational tax burdens riding in the dusty wake of unleashed bulldozers. These may not have been successful courtroom arguments, but they were respectable planning concerns.

Many of the strains pulling and tugging within the institution could be sensed in the statement of a Greenwich selectman. Reflecting on his town's pattern of expansion, he predicted that by 1980 it would have taken the maximum number of people it could accommodate under its zoning laws.

"And then we'll simply stop growing, and that's fine because that's the way the people of Greenwich want it." ³⁶

It was an attitude quite representative of suburban thinking all over the nation. Yet just next door virtually all of America's cities were still flying the banners of limitless growth. Often the suburbanite commuted to his business or bank in the city where he helped to raise those banners. Mammoth cities like New York and Los Angeles and others like Philadelphia, Phoenix, New Haven, and Boston shared the same creed of continuous enlargement of population, industry, business. In the late 1960's the motto of America's cities was "more is good."

They made and used their zoning regulations in the image of that belief. The zoning envelopes for homes, business, and industry were still measurable in units of fantasy. The prospect of having the next census announce a drop in population was taken as a sign of sickness for the city and trouble for the political party in power at the time. Planners often had no idea of how many people their city would accommodate under existing zoning regulations. Occasionally they insisted that whatever the figure, it was a piece of irrelevant information.

With the growth of urbanism as a central fact of American life came an enormous rise in the public's exposure to the subject. One evidence of it was the creation of a new federal Department of Housing and Urban Development in 1965. Beginning with the first small steps such as the one Hoover had taken early in the twenties, and burgeoning through the New Deal's involvement in slum housing programs, financing and insuring of home building, and urban construction projects, the national government had become deeply enmeshed in a wide range of uncoordinated activities. These were gathered together in the new department. It became the conduit through which federal funds were channeled into the cities and towns of the nation for a continually expanding series of programs. They were so complex that the ordinary citizen was hopelessly overwhelmed by the sheer numbers of their names, let alone what they were trying to accomplish. Some of the funds went into financing the preparation of new urban plans and zoning schemes under arrangements in which the federal government typically bore the heaviest share of the costs.³⁷ For most cities straining to produce tax revenues to pay for the increasing local governmental services demanded, the offer of funding from another source was usually irresistible.

These federal funds played an important role in creating a demand for city planners which outran the supply. Graduate planning education was at an all-time high. Planning students were preparing to take jobs in local government which often seemed remote from the tasks they had been trained to handle.

In the mid-sixties an extensive survey of city planning commissions in the United States disclosed that on the average the commissions spent about one-half their time on zoning matters. A number of them were giving as much as three-quarters of their time to zoning problems. Yet the curricula of planning schools throughout the nation listed no courses with "zoning" in their titles. When the concept did appear it was under some other and broader head such as "land use regulation" or "planning law."³⁸ The precise numbers and the exact titles did not matter as much as the fact, confirmable by discussion with planners all over the nation, that professionally trained people in cities of all sizes were spending substantial amounts of their time on zoning; that zoning was still the principal land use control in America's towns and cities; and that more often than not it was their crucial planning control.

One of the questions which threw some light on the actual effect of zoning in the cities was what would happen if it were suddenly repealed. Planners in a number of cities agreed that the areas most likely to be affected rapidly would be the high-class residential districts. They would be penetrated by apartment house developments, and homes would undergo conversion for commercial uses prohibited by current ordinances. Houston, the most notorious example of an unzoned American city, seemed to confirm their predictions.³⁹ Marginal residential areas would probably experience an outbreak of nuisance-type industrial activity. The most immediate and effective alternative control for apartment developments would be in the hands of the lending institutions which ordinarily finance such building. In the final analysis, however, there was still a striking lack of information about the actual consequences of zoning in the nation's cities. A 1964 study which set out to document its impact was stymied at the outset because the materials were lacking.⁴⁰

Beyond anything else, the boom in the suburbs had brought the citizen into direct involvement with zoning. Often he came willingly. Often the city planner did not.

Disenchantment with zoning in the 1930's led to professional boredom.

By the 1960's the lack of interest had been aggravated by the planners' strong feelings that when they were dealing with zoning they were dealing with something unclean. Lawyers felt this too. There was substantial evidence from many places in the nation that the institution was being corrupted. The executive director of the American Society of Planning Officials described it as a "marketable commodity," citing such planners' statements as: "you can buy with money any kind of zoning you want in half the communities of the United States."⁴¹ The trouble could be found in places as far apart as Honolulu and Philadelphia. One instance of massive rezoning brought forth the wrath of the Secretary of the Interior. Two days after an election in Montgomery County, Maryland, the lame-duck county council rezoned two thousand acres for housing, apartments, and commercial development, thus threatening federal plans for the redemption of the Potomac River.⁴²

There were convictions for bribery and conspiracy, imputations of sinister misdoings, conflicts of interest, and the frequent belief that even when there was no outright corruption, zoning decisions all too often were made with undue concern for the real estate interests in the town. It all added up to a distinct climate of cynicism about the institution.

For the planner, to spend much time on an often reviled subject seemed to deny the relevance of a good deal of his professional education. Yet zoning was an important learning experience in the realities of decision-making in local government. Even when zoning in a town was free of taint, the planner was often still very skeptical about the efficacy of his advice. Planning principles were commonly overridden by other considerations which the planner was sometimes expected to rationalize.

During the 1960's this environment helped contribute to the anxiety state apparent in a number of planners. They spent considerable time trying to work out a professional identity and a code to match it. Probably much of their discomfort was due neither to the relative youthfulness of their discipline nor even to their often low opinion of public morality, but to that uneasy sense of impotence which comes from knowing that one's training may have no consequences.

In this setting of extensive public involvement in an institution to which planners gave large shares of their effort, and contempt, there appeared a new body of critical and prophetic thinking.

In 1964 the American Society of Planning Officials invited Professor

John W. Reps, chairman of City and Regional Planning at Cornell University, to deliver its prestigious Pomeroy Memorial Lecture. Anticipating zoning's fiftieth anniversary in 1966, he proposed to celebrate the golden jubilee by mercifully killing the institution. Accordingly he composed a "Requiem for Zoning."⁴³

He said, somewhat extravagantly, that the difficulties were principally the fault of the planners. "We have unnecessarily prolonged the existence of a land use control device conceived in another era when the true and frightening complexity of urban life was barely appreciated."⁴⁴ He proposed "a search for a new legislative substitute sturdy enough to survive in the modern urban world."⁴⁵

The discussion of difficulties was quite detailed. At times it read more like a post-mortem than the diagnosis of a living institution. It deserves extended examination because by the time Reps had completed his outline of the new alternative, he had summarized a number of the more important proposals which fifty years of experience had yielded.

Reps began with the problem of the police power, the foundation upon which zoning had been raised in the courts. He thought that the police power was no longer an adequate basis for public efforts to manage land uses. If communities attempted to control development by a "taking" rather than a mere restriction of private property, the courts would stop them with the constitutional barrier against such uses of the police power. The way to avoid the problem was to pay for the taking by "a system of compensation to supplement the police power where severe limitations on land use are deemed essential or desirable to shape and guide community development."⁴⁶

The proposal to pay for some restrictions had earlier been suggested by Harvard Law School Professor Charles M. Haar as a method for introducing more flexibility into land use controls.⁴⁷ Disputes over payment would be administered, not by a court as in takings under eminent domain proceedings, but by a "state review agency." The measure of payment would be only the difference between the value of the land under its most severe police power regulation and the value it would have after further restrictions had been imposed upon it by a "local administrative body." If the owner were later permitted to use the land more intensively, he would repay the compensation in the form of a "betterment" charge. Reps believed there ought also to be another system of betterment charges for that portion of "increased land value conferred by public activities."⁴⁸

He thought that state legislation ought to make zoning compulsory for all communities rather than the optional measure it had always been. The unit of government to administer it should be something larger than each community. The possibility of having widely differing regulations among local governments had caused serious difficulties in the past and, in his view, the way to solve these troubles would be to put power into units the size of counties, or metropolitan governments, or possibly even the state government itself.⁴⁹

Zoning should cease being predictive—announcing in advance what an owner may do with his land. By doing this it had bred constitutional problems in advance of actual development. The difficulty could be avoided by withholding land-use decisions until such time as a new development or a change of use was to take place. This, he argued from an earlier suggestion of Daniel L. Mandelker, would dampen all constitutional litigation except that which might arise from the particular change in question.⁵⁰

The district-by-district classification of uses had “Balkanized our cities into districts with precise and rigid zone boundary lines.”⁵¹ The result had been an unsuccessful effort to anticipate all situations. In addition, Reps suggested that it had frustrated the intelligent mixture of land uses. Why not, he asked, simply do away with the districts or de-emphasize their preoccupation with lists of compatible uses?

He believed that zoning regulations, like other development controls such as subdivision regulations, were often in conflict with each other and he proposed that a single body of controls be adopted in one ordinance. So, too, he thought there was no necessary connection between zoning and a comprehensive community plan. After several decades of litigation in the nation’s courts, it appeared that the crucial provision in the Department of Commerce’s Standard State Zoning Enabling Act requiring zoning to be drawn “in accordance with a comprehensive plan” was honored more in the avoidance than in the compliance. Zoning, rather than its purposes, had early become the subject of most interest. As a result, courts frequently tended to equate zoning and planning.⁵² For Reps, the way out of the “circular reasoning” was legislation requiring local development controls clearly to be based upon a community plan. This plan was central to the entire new structure he proposed.

He complained of a lack of sufficient discretion in zoning administration. The defect ought to be cured by altering the system of controls. In addition, the review of local zoning decisions occurred only when an aggrieved

person sought it. There should be a system of state or metropolitan review which could oversee both procedural fairness and substantive conformity with large development objectives. Closely related to this proposal was his belief that courts are poorly equipped to decide the merits of the increasingly technical zoning and planning problems coming before them. These ought to be decided in an administrative rather than a judicial system.⁵³

Reps suggested that there were signs that some of these proposals were already materializing in the United States. Techniques like the "floating zone," or the increasing use of special exceptions, were tending to tie together closely related development controls. In proposing to do away with zoning maps, he would have substituted the comprehensive plan, graphically expressed, as the standard by which enlarged discretion ought to be measured. In addition, he thought there might also be quite detailed standards such as those appearing in zoning ordinances which had adopted performance standards rather than inflexible use specifications. Under these new provisions, permission to use land was controlled by objective criteria such as smoke emission, traffic generation, and odor production rather than the endless cataloguing of specific uses that were traditionally permitted or prohibited in each district.⁵⁴

Reps believed that this system was most appropriate for the urban fringes or those undeveloped sectors near the urban area. Where sections had been built up he thought the orthodox system of zoning might better be retained. In older parts of the city where urban redevelopment was going on, zoning should be displaced by deed restrictions imposed during the period when the land under redevelopment was in public ownership.⁵⁵

By the time Reps had composed his requiem, there was an impressive national show of professional interest in the condition of zoning and planning. A good deal of the new literature had a strong academic tinge and was produced in the journals and reviews of the law schools as well as a new species of law school casebook intended to serve an increasing demand for courses on planning law.⁵⁶

In 1961 the Ford Foundation granted funds to the American Society of Planning Officials to study and evaluate zoning law and practice in the United States and Europe. Richard F. Babcock, a member of the Chicago bar with an extensive background in the zoning field, conducted the study. He traveled in the United States, England, and Scandinavia to examine land-use and development controls. Apparently as a result of the Babcock

study, in 1963 the Ford Foundation granted a half-million dollars to the American Law Institute to review zoning and land-use regulations and develop model laws. A small committee of law professors managed the A. L. I. projects. In April, 1968, the Institute published the first of what promised to be an extensive series of draft proposals for a Model Land Development Code, an enabling act which seeks to update the influential Standard Zoning and Planning Acts which Herbert Hoover's Department of Commerce had prepared over forty years before.⁵⁷ In view of its management, this first draft quite predictably bore strong evidence of the widening academic interest and thought in land-use regulations.

In 1966 Babcock published *The Zoning Game*,⁵⁸ a chatty treatment of his earlier A.S.P.O. study. Reviving Ernst Freund's early perception about the central problem of the residential district, Babcock fixed upon the suburbs as the seat of most of the activity and problems in the field. Although there had been many changes in zoning technique, "The insulation of the single family detached dwelling was the primary objective of the early zoning ordinances, and this objective is predominant today . . ." ⁵⁹

Babcock's and Reps's prescriptions looked very much alike. What Babcock added was an elaborate argument for transforming zoning from a piece of machinery autonomously run by a local government into a very fluid set of development controls operated by some larger unit of government. Until that happened, he thought that the basic troubles would continue. "The trouble . . . with the Planning Theory of zoning is that by deifying the municipal plan it enshrines the municipality at a moment in our history when every social and economic consideration demands that past emphasis on the municipality as the repository of the 'general welfare' be rejected." ⁶⁰

In a half-century, then, the basic concern of zoning's founders had changed over from the question of what general welfare meant to the question of who was its guardian. He answered: "Municipal boundaries probably are not coextensive with a welfare that is truly general." ⁶¹

His formula for insuring controls which served a truly general welfare was to create legislative standards policed by a centralized administrative agency to review zoning decisions. As far as he was concerned, the agency to conduct that review ought to be the state government.⁶²

As the interest in general welfare had shifted from a question of meaning to one of guardianship, so the lawyer's attitude about the courts had also changed remarkably. Where Bassett and his colleagues were very con-

cerned about getting their great reform measure past the barrier of the courts, Babcock was now suggesting that the courts ought to become the instrument for the great reform of zoning. In a half-century the object of fear had become the object of hope.

The path of reform of the substantive chaos in land-use law, if any is to be achieved, leads to the bench before it can emerge from the legislature. The uncertain political balance in the state legislatures permits no reform in this area in the absence of a substantial challenge by the courts to current practices. The current swing to one-man, one-vote in the state legislatures will only increase the power of the suburbs which have the most to lose from legislative reform in zoning law.

The legislative job is to reform, without delay, the incredible disarray of zoning procedure and—when stung by the courts—to command new and less parochial standards by which the reasonableness of municipal decisions will be tested.⁶³

In response to a sweeping congressional mandate in the Housing and Urban Development Act of 1965, in January 1968 President Johnson appointed the National Commission on Urban Problems, naming ex-Senator Paul H. Douglas its chairman. Following an extensive nation-wide investigation into zoning, housing and building codes, housing programs, and government structure, finance and taxation, the commission published its report in December 1968.⁶⁴

Its recommendations generally bore the markings of proposals that had been developing during the 1960's. This was particularly apparent in measures aimed at removing zoning jurisdiction from hundreds of small local government units into larger ones whose authority covered metropolitan, regional, or state-wide areas. In contrast to the source of proposals that had come from Hoover's Department of Commerce during the 1920's, a good deal of the thinking that went into the Douglas commission's zoning recommendations came out of Academe rather than from a direct experience in urban reform.

There were several noteworthy things about the new turn of thought.

The gathering program to transform America's zoning seemed to have dual nationality. Its approach to America's land-use problems was so closely related to the post-war experience in Great Britain that it might be called mid-Atlantic. As zoning had first come to the United States with the deep imprint of western Europe upon it, so now the new model being designed in the United States featured distinctly British lines.

It was, as Reps and others acknowledged,⁶⁵ a system of controls which closely resembled the one which had been developing in Britain since 1947. In Britain what had begun shortly after the war as its particular domestic solution to land-use problems was now evolving into something which had American features about it. In 1963 Babcock thought that the systems were ". . . converging. Each is absorbing, probably without conscious purpose, the characteristics of the other."⁶⁶ American controls were losing some of their rigidity and some of their local autonomy, while the English system was tightening into one of greater rigidity and predictability.

In 1955 Norman Williams, Jr., had anticipated the trend of the sixties by identifying the central problem. ". . . there is perhaps an innate conflict in the whole business of local and regional planning. Inevitably, the logic of any procedure which seeks to analyze all needs impartially, and to provide for those in order of priority, has a built-in democratic bias. Yet, particularly since planning is so largely administered locally, there is no question that planning techniques (and technicians) have often been utilized for local and exclusionist purposes—even though in effect this obstructs planning for the larger areas."⁶⁷

One of the most interesting things about the two systems of land-use controls was that each of them had more than its share of difficulties in its home country. No one was noticeably excited about how their composite would perform. The new prescription thus stood in sharpest contrast to the first solutions which had come out of New York in 1916. It lacked the old enthusiastic optimism which had infected all kinds of social reforms in the early twentieth century.

If the structure of orthodox American zoning had been an extremely complex honeycomb of use districts distributed unevenly throughout the hive of the state, the new version seemed like a proposal to melt the comb, leave the hive, and let the democratic process take its unpredictable course. The emergent formula was not heavily identified with specific results such as decongestion or the enlarged amenities of light and air. If it made any promises at all, they had something to do with enlarging the unexplored possibilities of social choice and planning design in the newly developing areas around America's cities.

Some of the lack of excitement about the new proposals resulted from the growing complexity of urban life. Part of it was due also to serious skepticism about the men who would administer such a new system. Reps felt less certainty about their capabilities than he did about the courts'

willingness to permit the innovations. He wondered if the planners and the others who would get new discretionary powers would be up to the challenge, whether they would be informed and strong enough to resist the political pressures that would be brought to bear on them. But, he concluded, “. . . we should not lose hope in evolutionary progress.”⁶⁸

The pioneering efforts to make the institution did not occur in isolation nor did the efforts to change it into something else. The new efforts, in their absence of theory, their impulse to dissolve complex regulations and open up new areas of choice, their cool willingness to risk the uncertainties of enlarged freedom, their curious fluid vagueness, seemed to hint of much wider changes going on in the style and conception of American life in the closing years of the century. They also shared something of that remarkable fascination with fresh forms which those years were brewing out of imagination and a craving which may have been part of the American tradition of the clean start seasoned with a dash of escapism.

The new thinking seemed to treat the future of zoning as if it were destined to unfold in undeveloped areas beyond the urban sectors. By paying little attention to the institution as it was still functioning in hundreds of America's older cities, it seemed silently to regard their controls as beyond redemption and therefore beyond interest.

The growing campaign to remake the basic set of controls was doubtlessly stimulated by the remarkable new town movement which followed World War II. During a period when the nation and much of the world were increasingly concerned about the implications of urbanism, these dramatic efforts to solve some of the grave problems of uncontrolled growth had widespread appeal.

Feelings about new towns, and the policy of planned dispersion which lay behind many of them, sometimes seethed with the fervor of religious warfare. Opponents like Jane Jacobs regarded Ebenezer Howard's seminal ideas as “silly substance” but also as killers of great cities.⁶⁹ Defenders like Sir Frederic J. Osborn dismissed “congenital megalopolitans”⁷⁰ with assurances that Howardians did not hate cities. Sir Frederic simply believed: “The Heaviest Man on Earth may understandably derive a speck of consolation from his supremacy; but he deserves commiseration rather than congratulation. And so do the swollen cities, when the consequences of their magnitude are understood.”⁷¹

By 1967 there were twenty-three new towns in Britain, some just beginning and others nearing completion. Eight of them were intended to pro-

vide homes and nearby work for some half a million people who might otherwise be living in cramped London quarters or journeying excessive distances to their work. Five were designed to relieve Glasgow's congestion. Some were being built to serve local industrial needs. One had only to drive out through the almost endless gray smear of north London to sense the validity of Ebenezer Howard's ideas. To see gracefully aging Letchworth and thriving young Harlow would remove whatever doubts remained.

The Dutch were building new towns on land reclaimed from the sea. The Swedes had several going up on the periphery of Stockholm. Tapiola in Finland was possibly the most widely admired of all the new towns. In the United States the federal government was not yet involved as it had been in the Greenbelt Towns experiment of the thirties, but there was an impressive engagement of private industry in towns like Reston, Virginia, and Columbia, Maryland.⁷² There were serious proposals to commit the federal government to a policy of building 350 new towns for some fifty to one hundred thousand people each.⁷³

In all of these varied, prodigious efforts and in all of those to come, there was the central problem of planning. Many of its subsidiary problems in land-use control, the distribution of population, and the bulk of buildings were the stuff with which the zoning institution was supposed to have grappled. However it had fared over its half-century of American life, the institution had dealt with them in the same setting of law which would surround these problems in the new towns as well as in the older centers of urban life. Whether zoning was to die, or be transformed, or to live on substantially unchanged, its setting would remain.

The message was there for all to read. The World Health Organization had soberly announced that the vast expected increase in urban population "clearly justifies the warning that, after the question of keeping world peace, metropolitan planning is probably the most serious single problem faced by man in the second half of the 20th century."⁷⁴ If America was to manage the movement in which it was already deeply engulfed, it would have to plan to manage it effectively. It would have to plan in a spirit which freely accepted profound changes of attitude about matters such as land ownership, the rightful role of government in an urbanized, industrialized democracy, the proper obligations of citizenship, and the worth of each life. In the final analysis everything would depend, as it always had, upon the nation's will.

As the twentieth century went into its closing years, America had never

possessed such energies or been so possessed by them. Its people continued both to enrich and to maim their diverse lives and incomparable land. No one could say how they would deal with yet another bewildering era that was upon them. But there were still those occasional flashes of what the mystical Louis Sullivan and the practical reformers had fleetingly glimpsed Americans might do for urban life with their incredible engine.

A machine shop stood in Gary, Indiana. Its usual business was making highway bridge girders. In the spring of 1967 a quarter of a million pounds of inert steel lay spread out on its grimy floor. A year earlier Pablo Picasso had given the people of Chicago a tiny, ten-pound sculpture of a bird. Out of his twentieth-century genius and another kind of twentieth-century genius concentrated in such shops there had come about a project to quicken the steel into a great eagle which would soar in Chicago's Civic Center.

Willie Wainwright, a middle-aged machinist directly descended from the men who put the windows in the cathedral at Chartres, had spent two weeks on a small piece of the project. "They didn't teach art where I went to school in Memphis," said Mr. Wainwright. "But on any job I do I want it to come out just so. I made this just like Picasso wanted it." He added: "I think it's a beautiful bird . . . I feel like a part of it is mine."⁷⁵

The civilization had indeed changed profoundly. But something survived from that golden age of the Republic which had mothered zoning. Different men continued to ponder the same question of why the hope so outran the performance in America's urban life. Distant dreams lingered on, dreams of bright new towns folded into green countrysides and great shining cities brooming away the darkness of industrialism. There were blurred outlines of men, the Bassetts and the Howes full of curiosity and faith in progress. They were sailing off for Edward's England and the Kaiser's Germany across a sea more fathomable than the one which still held all the promises that law might keep.

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66. "Zoning's Greatest Danger—Lawless Acts by Boards of Appeals," *American City*, XXXVII (August 1927), 231, 233.
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73. Robert A. Walker, *The Planning Function in Urban Government* (Chicago: University of Chicago Press, 1941), p. 59.

CHAPTER 8 / DOWN THE AVENUE

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7. R. 1-3, 28-29, Exhibit "B" (map attached to the complaint).
8. R. 4-6, 146.
9. R. 167, 204.
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12. R. 175.
13. R. 176.
14. R. 208.
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18. R. 6, 11.
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24. R. 132.

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27. R. 41.
28. R. 32-33.
29. R. 26.
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39. *Ibid.*
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42. 297 Fed. 307, 309.
43. *Ibid.*
44. *Ibid.*, at 313, citing *Cleveland, etc. Ry. Co. v. Backus*, 154 U.S. 439 (1894), 445 *inter alia*.
45. At 297 Fed. 314.
46. *Ibid.*, at 316.
47. 297 Fed. 311, citing *Block v. Hirsh*, 256 U.S. 135 (1921); *Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922).
48. 260 U.S. 393 (1922).
49. At 260 U.S. 413.
50. *Ibid.*
51. *Ibid.*
52. *Ibid.*, at 413-415.
53. *Ibid.*, at 416.
54. *Ibid.*, at 422.
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56. 214 U.S. 91 (1909).
57. 245 U.S. 60 (1917).
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3. Tocqueville, *op. cit.*, I, 156.

4. Alfred Bettman, "The Decision of the Supreme Court of the United States in the Euclid Village Zoning Case," *University of Cincinnati Law Review*, I (1927), 184.
5. James Metzenbaum, *The Law of Zoning* (New York: Baker, Voorhis, 1930), p. 109. The same publisher brought out a second edition of this work in three volumes in 1955. The first edition gives Metzenbaum's personal account of the appeal in richer detail.
6. Letter of Sept. 22, 1924, from James Metzenbaum to the Clerk of the Supreme Court of the United States (*Euclid* file, Record Room, Supreme Court of the United States).
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8. *Ibid.*, p. 111.
9. *Ibid.*, p. 112.
10. *Ibid.*, p. 113.
11. *Village of Euclid v. Ambler Realty Co.* in the Supreme Court of the United States, October Term, 1926, No. 31; "Brief on Behalf of Appellants," p. 47. Letter of Dec. 28, 1925, from Edward M. Bassett to the Clerk of the Supreme Court of the United States; letter of Dec. 31, 1925, from the Clerk to Bassett (*Euclid* file, Record Room, Supreme Court of the United States).
12. Letter of Dec. 30, 1925, from Robert Whitten to the Clerk of the Supreme Court of the United States; letter of Jan. 4, 1925 [*sic*], from the Clerk to Whitten (*Euclid* file, Record Room, Supreme Court of the United States).
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14. *Ibid.*, pp. 57-58.
15. *Ibid.*, p. 54.
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17. *Village of Euclid v. Ambler Realty Co.*, "Brief and Argument for Appellee," p. 38.
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21. *Ibid.*, p. 83.
22. *Ibid.*
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27. Letter of Aug. 19, 1925, from James Metzenbaum to the Clerk of the Supreme Court of the United States; letter of Aug. 21, 1925, from the Clerk to Metzenbaum (*Euclid* file, Record Room, Supreme Court of the United States).
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29. *Village of Euclid v. Ambler Realty Co.*, "Motion for Leave to File Brief, Amici

- Curiae and Brief on Behalf of the National Conference on City Planning, the National Housing Association and the Massachusetts Federation of Town Planning Boards, *Amici Curiae*, Motion," p. 2.
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 31. Alfred Bettman, *City and Regional Planning Papers*, ed. Arthur C. Comey (Cambridge, Mass.: Harvard University Press, 1946), p. 7. The essential facts of Bettman's life are presented in John Lord O'Brian's tribute to Bettman in the Foreword of this work.
 32. See Foreword to Bettman, *op. cit.*, which also contains, on p. xviii, Justice Felix Frankfurter's commendation.
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 45. *Ibid.*, at 388.
 46. *Ibid.*, at 390.
 47. *Ibid.*, at 394.
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58. *Wolff Co. v. Industrial Court*, 262 U.S. 522 (1923).
59. *Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924).
60. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).
61. *American Federationist*, XXX (1923), 400; *New York Times*, Apr. 12, 1923; quoted and cited in J. Francis Paschal, *Mr. Justice Sutherland* (Princeton: Princeton University Press, 1951), pp. 124-125.
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CHAPTER 11 / A TROUBLED RESPITE

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19. See, for instance, National Resources Planning Board, *National Relations to Local Planning* (Mimeo. Circular XIV; Washington, D.C.: Government Printing Office, 1939).
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51. Quoted in Arthur M. Schlesinger, Jr., *op. cit.*, pp. 370-371.
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CHAPTER 12 / DEATH AND TRANSFIGURATION?

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2. Quoted in Mark Sullivan, *Our Times* (New York: Scribner's, 1930), III, 136. See pp. 133-139 for an extended treatment of the impact of the dinner invitation. *The New York Times*, Oct. 19, 1901, p. 1, col. 7, collects a sampling of southern opinion; and the *New York Times*, Oct. 20, 1901, p. 1, col. 3, reports Roosevelt's surprise at the intemperate reaction.
3. *New York Times*, Nov. 21, 1967, p. 1, col. 2.
4. *New York Times*, Mar. 27, 1967, p. 35, col. 2.
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6. Jean Gottman, "The Skyscraper Amid the Sprawl," in *Metropolis on the Move*, ed. Jean Gottman and Robert A. Harper (New York: Wiley, 1967), p. 138.
7. See, for example, the *New York Times*, Aug. 5, 1965, p. 31, col. 2; Oct. 30, 1966, sec. III, p. 1, col. 1.
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9. *New York Times*, June 19, 1967, p. 59, col. 5.
10. *Evening Bulletin* (Philadelphia), Apr. 6, 1967, p. 60, col. 5.
11. U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1957* (Washington, D.C.: Government Printing Office, 1960), p. 7.
12. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1964* (Washington, D.C.: Government Printing Office, 1964), p. 5.
13. In 1960 the Census adopted a definition of "urban" which, for the first time, included urban towns in New England and urban townships in New Jersey and Pennsylvania. Under that definition virtually 70 per cent of the total population was urban. Under the previous definition it was 63 per cent (*ibid.*, pp. 1-2, 17).
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16. Theodore H. White, *The Making of the President 1960* (New York: Pocket Books, 1962), p. 261.
17. See Jean Gottman, *Megalopolis: The Urbanized Northeastern Seaboard of the United States* (New York: Twentieth Century Fund, 1961).
18. Ben J. Wattenberg, in collaboration with Richard M. Scammon, *This U.S.A.* (Garden City, N.Y.: Doubleday, 1965), p. 65. I am indebted to this work for its useful discussion of suburbanization in Chapter V.
19. *Ibid.*, p. 69.
20. *Ibid.*
21. *Ibid.*, p. 80; U.S. Bureau of the Census, *Statistical Abstract: 1964*, p. 5.
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23. See, for example, the *New York Times*, May 29, 1967, p. 1, col. 2; *Wall Street Journal*, Aug. 15, 1966, p. 1, col. 1; *Time*, LXIII (Mar. 2, 1959), 14; Leonard Gross, "Big Zoning Battle," *Look*, XXIX (Oct. 5, 1965), p. 93; Alfred Balk, "Invitation to Bribery," *Harper's*, Vol. 233 (October 1966), p. 18. It was also in syndicated columns. See, for example, Harry Golden, "Strict Zoning Ordinances," *Evening Bulletin* (Philadelphia), Oct. 27, 1967, p. 21, col. 3; and carried on wire services: *Philadelphia Inquirer*, Nov. 24, 1966, p. 8, col. 1.
24. Grace Metalious, *Peyton Place* (New York: Pocket Books, 1965). Of a different literary order, see John Cheever, "The Death of Justina," *Some People, Places and Things That Will Not Appear in My Next Novel* (New York: Harper, 1961), pp. 1-19.
25. The meeting from which this and subsequent quotes were taken was the "Zoning Workshop on the Remapping Process." It was held in Philadelphia on January 31, 1967, under the sponsorship of the Citizens' Council on City Planning.
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27. *Ibid.* The problem of racial exclusion associated with zoning in this article appears in reverse form—removal—in the *New York Times*, May 6, 1966, sec. 1, p. 96, col. 1.

28. *New York Times*, Sept. 18, 1967, p. 1, col. 5.
29. Oliver Wendell Holmes and Sir Frederick Pollock, *Holmes-Pollock Letters*, ed. Mark DeWolfe Howe (Cambridge, Mass.: Harvard University Press, 1941), II, 307. Letter dated Apr. 21, 1932.
30. *Wall Street Journal*, Aug. 15, 1966, p. 1, col. 1.
31. See "Snob Zoning—a Look at the Economic and Social Impact of Low Density Zoning," *Syracuse Law Review*, XV (1964), 507–521. It examines the economic argument that low density zoning reduces the cost of government and increases local tax revenues and finds it unconvincing and the social argument "sterile and undemocratic" (p. 521).
32. *Lionshead Lake, Inc. v. Wayne Tp.*, 10 N.J. 165, 181–182, 89 A. 2d 693, 701 (1952), appeal dismissed 344 U.S. 919 (1953). Charles M. Haar, "Zoning for Minimum Standards: The Wayne Township Case," *Harvard Law Review*, LXVI (1953), 1051–1063; Val Nolan, Jr., and Frank E. Horack, Jr., "How Small a House?—Zoning for Minimum Space Requirements," *Harvard Law Review*, LXVII (1954), 967–986; Charles M. Haar, "Wayne Township: Zoning for Whom?—In Brief Reply," *Harvard Law Review*, LXVII (1954), 986–993.
 Extensive notes on the validity of minimum area regulations appear at 95 A.L.R. 2d 716–750 and 95 A.L.R. 2d 761–790. See also Arden H. Rathkopf, *The Law of Zoning and Planning* (3rd ed; New York: Clark Boardman Co., Ltd., and Matthew Bender & Co., Inc., 1966), I, 34–35.
33. *National Land and Investment Company v. John*, 419 Pa. 504, 215 A. 2d 597 (1966).
34. *Ibid.*, at 419 Pa. 521, 215 A. 2d 606–607.
35. *Ibid.*, at 419 Pa. 532–533, 215 A. 2d 612. The Easttown Township Ordinance involved in the case had an extensive career in minimum lot litigation. See *Bilbar Constr. Co. v. Easttown Twp. Bd. of Adjustment*, 393 Pa. 62, 141 A. 2d 851 (1958); four comments on that case in John G. Stephenson, III (ed.), *Zoning for Minimum Lot Area* (New York: Central Book Co., 1961); and "One Acre Minimum Lot Size Requirement in Zoning Ordinance Held to be Constitutional," *University of Pennsylvania Law Review*, CVI (1957), 292.
36. *New York Times*, Mar. 7, 1967, p. 37, col. 2, quote p. 71, col. 4.
37. It also went into state-wide studies of zoning and planning legislation. For example, a federal grant from the Department of Housing and Urban Development, under the Urban Planning Assistance Program authorized by sec. 701 of the Housing Act of 1954, as amended, was administered by the Connecticut Development Commission to produce *New Directions in Connecticut Planning Legislation: A Study of Connecticut Planning, Zoning and Related Statutes* (Chicago: American Society of Planning Officials, 1967).
38. "Zoning May Not be Planning, But—," *ASPO Newsletter*, XXXI (February 1965), 9.
39. "What Has Happened in an Unzoned City," *American City*, LXVIII (March 1953), 93.
40. Jacob B. Ukeles, *The Consequences of Municipal Zoning* (Washington, D.C.: Urban Land Institute, 1964), p. 1.
41. Quoted in Balk, *op. cit.*, p. 18. See also Warren Eisenberg, "The Zoning Game," *Greater Philadelphia*, LVI (July 1965), pp. 39, 88–95.
42. *New York Times*, Nov. 20, 1966, sec. I, p. 70, col. 2.

43. John W. Reps, "Requiem for Zoning," *Planning* 1964 (Chicago: American Society of Planning Officials, 1964), pp. 56-67.
44. *Ibid.*, p. 56.
45. *Ibid.*
46. *Ibid.*, p. 59. For an indication of changing theory on the issue of "takings," see Joseph L. Sax, "Takings and the Police Power," *Yale Law Journal*, LXXIV (1964), 36-76.
47. Charles M. Haar, "The Social Control of Urban Space," *Cities and Space: The Future Use of Urban Land*, ed. Lowden Wingo, Jr. (Baltimore: Johns Hopkins Press for Resources for the Future, Inc.), p. 216.
48. Reps, *op. cit.*, p. 63.
49. *Ibid.*, pp. 54, 63-64.
50. *Ibid.*, p. 59, citing Daniel L. Mandelker, "What Open Space Where? How?" *Planning* 1963 (Chicago: American Society of Planning Officials, 1964), p. 25.
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52. Citing the widely discussed article by Charles M. Haar, "In Accordance With a Comprehensive Plan," *Harvard Law Review*, LXVIII (1955), 1154-1175.
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59. *Ibid.*, p. 3.
60. *Ibid.*, p. 123.
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62. *Ibid.*, pp. 166-173. For another indication that state supervision over local control might increase, see William A. Doebele, Jr., "Techniques for Stimulating and Controlling Physical Development," in *Physical Planning for Metropolitan Boston* (Cambridge, Mass.: Joint Center for Urban Studies of the Massachusetts Institute of Technology and Harvard University, 1965), pp. 29-43.
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